82-1053

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LILLIAN M. HAAS, Personal Representative of the Estate of and parent and next of kin of John V. Cataldi, deceased; CHERYL RUFF, personal representative of the Estate of and widow of and next of kin of Edwin J. Ruff, Jr., deceased; BETTY LOU SCHLECTIC BAHE, as guardian and next friend of Ginger Schlectic, minor child of Ralph C. Schletic, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS, personal representative of the Estate of and widow of and next of kin of Mark Lamascus, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS as guardian and next friend of Sarah Laine Lamascus and Mark David Lamascus, minor children of Mark Lamascus, deceased,

Appellants,

v.

UNITED TECHNOLOGIES CORPORATION, a Delaware corporation,

Appellee.

On Appeal from the Supreme Court of Delaware

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

(Negatively Stated)

1. DOES NOT THE REQUIREMENT OF "AN IMPARTIAL JURY DRAWN FROM A FAIR CROSS SECTION OF THE COMMUNITY", *THIEL V. SOUTHERN PACIFIC COMPANY*, 328 U.S. 217 (1947) AND *PETERS V. KIFF*, 407 U.S. 493 (1972), APPLY TO STATE CIVIL JURY TRIALS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. DOES NOT A STATE STATUTORY "SPECIAL" JURY SELECTION PROCEDURE FACIALLY VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE IT DELIBERATELY EXCLUDES OTHERWISE QUALIFIED JURORS AND THE SPECIAL JURY IS AVAILABLE ON DEMAND IN ANY CIVIL CASE WITHOUT REGARD TO CASE COMPLEXITY?

3. DOES NOT A STATE STATUTORY "SPECIAL" JURY SELECTION PROCEDURE VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE APPLICATION OF THE STATUTE RESULTS IN A JURY POOL THAT DELIBERATELY EXCLUDES PERSONS OVER SEVENTY AND UNDER THIRTY AND WHICH IS DISPROPORTIONATELY DOMINATED BY COLLEGE EDUCATED WHITE MALES?

4. WHERE A STATE COURT FINDS A STATE STATUTORY SPECIAL JURY SELECTION PRO-

CEDURE TO BE ARBITRARY AND POTENTIALLY DISCRIMINATORY, IS NOT THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION VIOLATED WHERE THAT COURT PROHIBITS FUTURE SPECIAL JURY TRIALS PENDING ADOPTION OF COURT RULE STANDARDS, YET DENIES RELIEF TO THE PARTIES BEFORE IT WHO WERE AFFLICTED BY THE SAME STATUTORY VICES JUSTIFYING PROTECTIVE RELIEF?

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Appellants,

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Appellee.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Delaware, dated August 25, 1982, which appears in the Ap-

pendix hereto, A.1a is reported at 450 A.2d 1173 (Del. 1982).

The previous opinion of the Supreme Court of the State of Delaware dated March 15, 1982, which was superseded by the opinion dated August 25, 1982, is not reported. It appears at A.26a. The opinions rendered by the trial court below, the Superior Court of the State of Delaware, in and for New Castle County, were dated November 26, 1980, and March 17, 1981. These opinions are not reported but appear respectively at A.126a and A.92a.

JURISDICTION

The opinion of the Supreme Court of the State of Delaware upholding the constitutionality of the Delaware special jury statute was rendered on August 25, 1982. A.1a. A motion for rehearing was denied on September 27, 1982, and the mandate isued on the same date. A.51a and A.50a.

A Notice of Appeal to this Court was duly filed in the Supreme Court of the State of Delaware, on December 15, 1982. A.52a.

This appeal is being docketed in this Court within ninety days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATE STATUTES

The Fourteenth Amendment to the Constitution of the United States provides in relevant part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

10 *Del. C.* §§ 4541-4543:

Subchapter II. Special Juries

§ 4541. Procedure for obtaining, striking and summoning special jury.

(a) A special jury for the trial of a cause, shall be ordered by the Court upon the application of either party.

(b) The party applying for the special jury under this section shall give due notice to the opposite party, and to the Prothonotary, of the time and place of striking such jury. At such time and place the Prothonotary, or his deputy, or if the Prothonotary is not indifferent between the parties, then 2 proper persons indifferent between the parties, appointed by the Superior Court, shall attend with a list of 48 indifferent and judicious citizens of the county, qualified to serve as jurors, showing their names and places of abode.

(c) The party applying for the special jury under this section, his agent or attorney, shall first strike out one of the names, and then the opposite party, his agent or attorney, shall strike out another, and so on, until each shall have struck out 12. If the opposite party, or any person on his behalf, shall not attend, or shall refuse to strike, the Prothonotary or his deputy, or the persons appointed to strike the jury, as the case may be, shall strike for the party not attending, or refusing to strike.

(d) After each party shall have struck 12 names under this section, the remaining 24 persons on the list shall be the jury to be returned for the cause. The Prothonotary, or his deputy, or the persons appointed to strike the jury, as the case may be, shall thereupon deliver to the sheriff a certified list of the names of such persons, with their places of abode, as the jurors to be summoned for the cause, annexed to a venire facias commanding him to summon them.

The sheriff shall, thereupon, summon the persons named, according to the command of the writ, and shall return the list with the venire. (Code 1852, § 2384; Code 1915; § 4274; Code 1935; § 4745; 10 Del. C. 1953, § 4541.)

§ 4542. Impaneling special jury at trial.

At the trial of the cause, a special jury shall be drawn from the list, returned under § 4541 of this title, in the manner provided in this chapter for other cases. In the selection of a special jury, if any of the 24 persons remaining on the list as provided in § 4541 of this title, are unable to sit as jurors, for any reason satisfactory to the Court, the Court may in its discretion limit the challenges by each party to not less than 3. If the panel is reduced, however, to less than 18, the Court shall dismiss the jury, unless the party requesting the special jury waives sufficient of his challenges to permit a jury to be selected. The costs of the special jury so dismissed in such case shall be borne by the party requesting the special jury. (Code 1852, § 2385; Code 1915, § 4275; 35 Del. Laws, c. 226; Code 1935, § 4746; 10 Del. C. 1953, § 4542.)

§ 4543. Expenses.

The party applying for a special jury shall pay the expenses occasioned by the trial of the cause by such special jury, and the same shall not be allowed to him as part of the costs in the case, unless the Court shall, immediately after the trial of the cause, certify upon the record that the cause was proper to be tried by a special jury. The Court, in its discretion, may order payment of the costs of striking and summoning a special jury, or any part thereof, before the trial of the cause wherein such jury is summoned. (Code 1852, § 2386; Code 1915, § 4276; Code 1935, § 4747; 10 Del. C. 1953, § 4543.)

10 *Del. C.* §§ 4501, 4503 and 4506

Subchapter I. Grand and Petit Juries

§ 4501. Declaration of policy.

It is the policy of the State that all litigants in state courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the county wherein the court convenes. It is further the policy of the State that all citizens shall have the opportunity to be considered for service on grand and petit juries in the courts of the State, and shall have an obligation to serve as jurors when summoned for that purpose. (60 Del. Laws, c. 225, § 2.)

§ 4503. Discrimination prohibited.

No citizen shall be excluded from service as a grand or petit juror in the courts of the State on account of race, color, religion, sex, national origin or economic status. (60 Del. Laws, c. 225, § 2.)

§ 4506. Qualifications for jury service.

(a) The President Judge of the Superior Court, or such other Superior Court judge as the plan may provide, on his initiative or upon recommendation of the jury commissioners, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The jury commissioners shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the President Judge of the Superior Court, or such other Superior Court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the Superior Court unless he:

(1) Is not a citizen of the United States 18 years old who has resided for a period of 1 year within the county;

(2) Is unable to read, write, and understand the English language with a degree of proficency sufficient to fill out satisfactorily the juror qualification form;

(3) Is unable to speak the English language.

(4) Is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; provided, however, that no person shall be deemed incapable solely because of loss of sight in any degree; or

(5) Has a charge pending against him for the commission of, or has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than 1 year and his civil rights have not been restored by pardon or amnesty. (60 Del. Laws, c. 225, § 2; 62 Del. Laws, c. 219, § 1.)

STATEMENT OF THE CASE

A. The Underlying Claim

The Appellants are the widows and survivors of four United States servicemen who were killed on January 8, 1975 in the crash of a Sikorsky CH-53 helicopter manufactured by the Appellee. Three of the decedents were Marine Corps crew members on a routine flight from North Carolina to New Jersey, and the fourth, Mr. Lamascus, was a United States Air Force passenger. The crash occurred in the State of Maryland and was the immediate and certain result of the in-flight fracture of one of six main rotary blades on the helicopter. Appellants brought this action for damages against Appellee United Technologies in the Superior Court of the State of Delaware in and for New Castle County.

Appellants contended that the helicopter should have been equipped with an in-flight monitoring device (Cockpit BIM*) that would have warned the pilot and crew of an incipient crack in a main rotary blade. The only warning system on the helicopter was a "visual BIM" on-the-ground monitoring system which Appellants contended was inadequate. The BIM system involved use of nitrogen gas held under pressure in the blades. A crack in the blade permits the release of the gas and a consequent drop in blade pressure, a measurable event. A signaling of this pressure drop during the flight would have given the crew an opportunity to take appropriate maneuvers to land the helicopter prior to a catastrophic in-flight fracture of the blade. The manufacturer, however, failed to include an in-flight monitor.

The manufacturer contended that an on-the-ground monitoring system (visual BIM), which prior to this particular flight advised maintenance crew members of a loss of pressure in the blade, was a sufficient warning system. Plaintiffs' trial evidence was aimed at demonstrating deficiencies in the visual BIM system that caused it to give unreliable indications of blade pressure loss, *i.e.*, false alarms, and thus encouraged a widespread disrespect for the system.

The case was tried in the Delaware trial court to a "special jury" based upon the substantive law of the State of Maryland, which adopts section 402(a) of the Restatement of Torts. *Phipps v. General Motors Corp.*, 363 A.2d 955 (Md. 1976). The manufacturer denied the existence of any product defect and charged contributory negligence and assumption of the risk on the part of deceased crew members in their alleged failure to heed the on-the-ground or visual BIM indication of a loss in blade pressure. The jury returned a verdict for the manufacturer against all

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* "BIM" is an acronym for "Blade Inspection Method."

decedents.[1] On appeal the Delaware Supreme Court first reversed on the ground that the trial court erred in failing to submit the cockpit BIM issue to the jury. A.26a. On reargument before a differently constituted court *en banc*,[2] the court withdrew its first opinion and then affirmed the special jury verdict for the defendant. A.1a.

B. Selection Of The Special Jury And Raising The Federal Question

Following routine discovery, and as the case was prepared for trial, the defense filed an application for a special jury, A.125a, and deposited with the court clerk the required sum of $750. A.91a. Under the law of Delaware, the trial court had no authority or discretion to determine whether a special jury was appropriate. It was legally required to impanel the special jury solely on the defendant's request. 10 *Del. C.* § 4541(a); *Nance v. Rees*, 161 A.2d 795 (Del. 1960).

The Appellants moved to prevent the impaneling of the special jury, A.116a, on the ground, *inter alia*, that the Delaware special jury selection procedure violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution. This motion was denied in an opinion dated November 26, 1980, relying upon this Court's decision in *Fay v. New York*, 332

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[1] Including the passenger Lamascus. The defendant below conceded, and the trial judge so instructed the jury, that the defenses of contributory negligence and assumption of the risk did not apply to him.

[2] After the initial decision dated March 15, 1982, its author, Justice William Duffy, retired. He was replaced by Justice Andrew G. T. Moore, II and the first opinion was "superseded" by an opinion dated August 25, 1982. 450 A.2d 1173. A. 1a. The superseding opinion, unlike the first opinion, erroneously states that the defendant cross-appealed from a denial of its motion for a directed verdict. 450 A.2d at 1174, fn. 1. A. 1a. There was no cross-appeal.

U.S. 261 (1947), which upheld the constitutionality of New York's then special or blue ribbon jury statute and practice, A.126a, and upon *Nance v. Rees*, 161 A.2d 795 (Del. 1960), in which the Delaware Supreme Court upheld the Delaware Special jury.[3]

The Administrator of the court was unable to state with any specificity what criteria were used prior to October 1980 (two months before the trial of this case) to choose names for the selection of the jurors from the special jury panel. A.127a. It is undisputed that the panel was heavily skewed in favor of white, middle-aged, well-educated, economically secure males. A.118a. For instance, only one person in 263 did not have a high school education, 4 percent of the panel was non-white (versus 13 percent for the County), nearly 84 percent had attended college (versus 16 percent for the County), and 34 percent of the panel was female (versus 54 percent for the County). *Ibid.*

The Administrator also stated that the jury commissioners[4] had *purposely excluded* from the jury pool *all persons* having twelve years or less of formal education and being under the age of thirty or over the age of seventy. A.121a. No reason was given nor is known for these eliminations. *Ibid.* Several days before trial, counsel for the parties met in the court clerk's office and participated in the initial "striking" procedure whereby each

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[3] The list of special jurors to be "struck" for this particular case was drawn from a box maintained in the Prothonotary's office consisting of 263 names. A. 121a. The names of potential special jurors which had been placed in this box had been placed there at various times over a long period of years. *Ibid.* Some of these jurors had served on special juries before, and following their service had had their names returned to the box. *Ibid.*

[4] Although the special jury statute, 10 *Del. C.* § 4541, directs that the "Prothonotary, or his deputy" prepare the list of special jurors, the exclusion decisions were made by the jury commissioners who are nowhere mentioned in the statute.

side alternately struck one name from the panel list. In this case the defense exercised its twelve strikes to eliminate twelve female members of the panl.[8]

A defense verdict was rendered by the special jury on January 20, 1981.

C. The Decisions Of The Courts Below

1. *The Trial Court Opinion Upholding The Special Jury Practice*

Following a verdict for the Defendant-Below, Appellee, the Appellants moved for a new trial and renewed the motion that had been made prior to trial alleging, among other things, that it was error to permit the case to be decided by a special jury, that the long-standing special jury practice violated the subsequently enacted (1975) Random Juror Selection Act, 10 *Del. C.* §§ 4501, *et seq.*, and that the Delaware special jury procedure was an unconstitutional anachronism, both on its face and in practice. A.104a. This argument was rejected by the trial court which observed that:

> Although special jurors are in practice selected from among regular jurors who have completed their term of service, they are not selected randomly. Those persons are selected who are considered more suitable for complex civil cases because of their education and

[8] When the trial commenced on December 1, 1980, a twelve-person special jury with six alternates was selected. The decision in this case was rendered by a jury that was 84 percent male, consisting of 10 men and 2 women. Of the 10 men, one was retired, one was self-employed, and the remaining eight were employed by large corporations. Of the women, one lady was retired, and one was employed as a bookkeeper. The jurors ranged in age from 38 to 70, with seven of them in their 50's. The juror who was aged 70 had had her name placed in the special jury box prior to October, 1980. There were four other jurors whose names had been placed in the special jury box prior to October, 1980, who were under the age of 30; however, they were either stricken or excused for cause prior to the time this special jury was impaneled.

> experience. Thus, by definition the general level of education and experience of special jurors is expected to differ from that of regular jurors or the population at large. This is the purpose of special juries. A.102a.

However, there is no evidence of record to support these observations regarding the suitability of the special jurors or the purported purpose of the special jury selection system. Nor is there any statutory or judicial limitation on the use of special juries for only "complex civil cases". *Nance v. Rees*, 161 A.2d 795 (Del. 1960).

In ruling upon the Appellants' motion for a new trial, the Delaware Superior Court expressly held that the Delaware Random Juror Selection Act, 10 *Del. C.* §§ 4501, *et seq.*, which was adopted in 1975,[6] did not apply to special jurors. A.102a. No reason was given for this decision. The trial judge also relied upon this Court's decision in *Fay v. New York*, 332 U.S. 261 (1947), and a Delaware state court case decided twenty years before, *Nance v. Rees*, 161 A.2d 795 (Del. 1960), which had upheld the constitutionality of the Delaware special jury statute but had labeled those juries "defendants' juries" and had urged the Delaware legislature to abolish the Delaware special jury system. The absurd rationale of the 1960 decision was: "Plaintiffs (in an automobile accident case) argued that the practice is violative of due process under the 14th Amendment of the Federal Constitution,

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[6] This statute was patterned after the "Jury Selection and Service Act of 1968," 28 *U.S.C.* §§ 1861, *et seq.*, which has as its major goal securing the random selection of juries from a fair cross-section of the community. *United States v. Maskeny*, 609 F.2d 183 (5th Cir. 1980), *cert. den.*, 447 U.S. 921 (1980), *reh. den.*, 448 U.S. 912 (1980). *United States v. Potter*, 552 F.2d 901 (10th Cir. 1977) announced that this Act establishes "as a national policy the right of all litigants to have grand (and, of course, trial) juries selected at random from a fair cross-section of the local community." 552 F.2d at 902. The 1975 Delaware statute traces, almost verbatim, the 1968 Federal Act. It appears in full at A. 132a-144a.

but we think not. Since the practice long antedates the Revolution, it cannot be inconsistent with due process of law. *Ownbey v. Morgan*, 256 U.S. 94, . . ." 161 A.2d at 799.

2. *The Delaware Supreme Court Opinions In The Case At Bar*

The Delaware Supreme Court dealt with these questions by tracing the history of special juries and then first upholding the constitutionality on its face of the Delaware special jury statute.

> The special jury as an institution is ensconced in Delaware law and is not constitutionally infirm. A.19a.

The Court then went on, however, to condemn the potential of the special jury statute for discrimination and issued a directive requiring the Superior Court to develop criteria in the future that would provide for the purported fair selection of future special juries, suggesting persons who meet "specified age, intelligence, and educational requirements" and possessing "special occupational skills." A.24a. Despite that, the Delaware Supreme Court failed to grant relief to the parties before it and declined to reverse the verdict that was renderd in this particular case.[7]

After reviewing this Court's decisions in *Moore v. New York*, 333 U.S. 565 (1948); *Fay v. New York*, 332 U.S. 261 (1947); *Brown v. New Jersey*, 175 U.S. 172 (1899), the Delaware Supreme Court sustained the constitution-

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[7] This case had an unusual history in the Delaware Supreme Court. It was first argued before a three-justice panel in October 1981. It was then argued before the *en banc* court composed of four justices in January 1982 and that bench rendered the unanimous March 15, 1982 opinion. Thereafter, reargument was granted and the writing justice retired; the case was reargued before a four-justice bench with three of the justices still presiding and this resulted in the unanimous August 1982 opinion authored by a different justice.

ality of the Delaware special jury statute on the following basis:

> The [United States] Supreme Court has not yet reviewed the constitutionality of a special jury statute in a *civil* setting. The one Supreme Court case dealing specifically with a challenge to a civil jury did not involve a blue ribbon jury and was decided not on constitutional grounds but upon the supervisory power of the court over the administration of justice in the Federal system. *Thiel v. Southern Pacific Company*, 328 U.S. 217 (1946)

(Emphasis in original). A.20a.

The Delaware Supreme Court further held that "it is not clear that the same Due Process and Equal Protection standards applicable to jury selection in a criminal trial would be applicable in a civil trial." A.21a.

Appellants moved for reargument on September 9, 1982. Renewing earlier arguments, Appellants contended that for the Court to conclude that the Delaware special jury practice was so arbitrary and potentially discrimianatory that no future litigant should be exposed to it in its present form yet to deny relief to the litigants before it who were victimized by that practice, was a denial of equal protection. A.56a. This motion was summarily denied. A.51a.

THE QUESTIONS ARE SUBSTANTIAL

I. The Questions Presented

This case presents questions which go to the heart of the fair administration of justice in this country. The questions involve whether the states are constitutionally obliged to provide in civil jury cases "an impartial jury drawn from a fair cross section of the community" (*Theil v. Southern Pacific Company*, 328 U.S. 217 (1946) as is required in all federal jury trials and in state criminal trials (*Peters v .Kiff*, 407 U.S. 493, 501 (1972)); and involve also the constitutional limitations upon the power

of a state court to deny relief to litigants exposed to constitutionally infirm jury selection procedures. Those questions, which have not been but should be decided by this Court, arise against the backdrop set forth below.

The Delaware Special Jury Statute (10 *Del. C.* §§ 4541-4543) makes a "special jury" available by right in any civil case. All that is required is a demand for a "special jury" and the payment of a $750 fee, and there are no statutory restrictions upon the availability of the special jury based upon the nature or complexity of the case. Nor does the statute provide any criteria or guidelines for the selection of the special jurors comprising the jury pool. The selection is left up to the unfettered discretion of court clerks. As a result there is no statutory mechanism to assure that the jurors comprising the so-called special jury pool represent a fair cross section of the community.

The first question posed is whether the requirement of "an impartial jury drawn from a fair cross section of the community" articulated in *Thiel v. Southern Pacific Company*, 328 U.S. 217 (1946) and *Peters v. Kiff*, 407 U.S. 493, 505 (1970) is applicable to state civil jury trials. The second question is whether the Delaware statute is facially repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it is available on demand without regard to case complexity and because it deliberately excludes otherwise qualified jurors from the special jury pool.

As applied in this case, the Delaware "special jury" statute resulted in the selection of a special jury pool from which all persons under thirty and over seventy were intentionally excluded and which was skewed grossly disproportionately in favor of middle-aged, college educated white males. The third question thus becomes whether a state is constitutionally permitted under the Due Process and Equal Protection Clauses to subject litigants to a civil jury drawn from a pool thus biased.

Appellants challenged the constitutionality of the "special jury" statute on the foregoing grounds in the state courts below. On appeal the Delaware Supreme Court found that the Delaware statutory special jury selection procedure was "arbitrary" and "potentially discriminatory," with representation of women statistically "suspect" and on that basis prospectively ordered that no "special jury" trials would take place pending adoption of lower court rules providing standards for future special jury selection.[8] However, the Delaware Supreme Court refused to grant relief to these Appellants who were before that court, even though Appellants had been victimized by the same statutory vices which had impelled the Delaware court to grant prospective relief.

The final question is whether the Fourteeth Amendment compels a state court to grant relief to the parties before it under those circumstances.

These question are substantial because the Delaware Supreme Court has decided important questions of federal constitutional law which have not been, but should be, settled by this Court and has decided them in a way that departs from the constitutional norm for jury selection. The questions have ramifications beyond the significant rights of these plaintiffs, because they present fundamental questions concerning the role of the civil jury in a democracy.

II. Substantiality Of The Questions

A.

The first two questions are substantial and merit review by this Court. While a state is free to modify or even to abolish jury trials in civil actions altogether,

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[8] The criteria suggested by the Delaware Supreme Court for selection of special jurors are themselves constitutionally impermissible because they contemplate exclusion of otherwise qualified jurors based solely on age, occupation, intelligence and education (minimum of college degree).

Palko v. Connecticut, 302 U.S. 319, 324 (1937), where a right to a jury trial is afforded the Fourteenth Amendment requires "a fair trial in a fair tribunal" and forbids creation of a system which violates the fundamental rights and interests of the litigants. *Peters v. Kiff*, 407 U.S. 493, 501 (1972) (regardless of the form of proceedings, due process requires impartiality and basic fairness). *Walker v. Sauvinet*, 92 U.S. 90 (1876); *Maxwell v. Dow*, 176 U.S. 581, 605 (1900); *Carter v. Jury Commissioners of Greene County*, 396 U.S. 320 (1970). The right to a fair and impartial tribunal guaranteed by the Fourteenth Amendment is fundamental. *Peters*, 407 U.S. at 501; *In re Murchison*, 349 U.S. 133, 136 (1955); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (administrative hearing); *Tumey v. Ohio*, 273 U.S. 510 (1927) (bench trial).

With respect to jury trials, this Court has recognized that the American tradition of trial by jury demands and necessarily contemplates an impartial jury drawn from a jury pool which, at least, presents a possibility for a representative fair cross section of the community. *Peters*, 407 U.S. at 500. *Thiel v. Southern Pacific Company*, 328 U.S. 217, 220 (1946). *See also Smith v. Texas*, 311 U.S. 128, 130 (1940) (Fourteenth Amendment); *Strauder v. West Virginia*, 100 U.S. 303, 308-9 (1880) (Fourteenth Amendment). And, in *City of Mobile v. Bolden*, 446 U.S. 55, 77 (1980), n. 24, this Court noted that "There is a constitutional right to a system that is not purposefully exclusionary."

On its face the Delaware special jury statute does not pass constitutional muster. First, by definition, a state "special jury" statute excludes otherwise qualified jurors from service, thus rendering impossible compliance with the constitutional mandate that the jury pool be fairly drawn from a cross section of the community. Such a statute also *per se* violates the constitutional mandate that the system not be "purposefully exclusionary." Second, even if the selection of individuals based on alleged

"special competence" to decide certain types of civil cases were constitutionally acceptable, the statute must nonetheless demonstrate, at a minimum, a rational connection between the alleged "special competence" and the type of civil action to be decided.[9] No such purpose can be ascribed to the Delaware statute, because it is available on demand without regard to the type or complexity of the civil action.[10] 10 *Del. C.* § 4541. *Nance v. Rees*, 161 A.2d 795 (Del. 1960); *Robelen Piano Company v. DiFonzo*, 172 A.2d 568 (Del. 1961). Third, the statute fails to specify any criteria or qualifications to become a special juror, or any procedural safeguards to assure that the "special jurors" are drawn at random from a cross section of the cognizable groups in the community.

The first two questions involve the most fundamental democratic values and their application to the administration of justice. If the "special jury" system results in "defendants' juries" (*Nance v. Rees*, 61 A.2d 795 (Del.

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[9] Where there is a fundamental right or interest, a state must demonstrate a compelling interest to uphold a statute depriving a citizen of that right and must specifically tailor the statute to further the statutory purpose. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972) (right to vote). Such a statute will be strictly scrutinized to determine if the proper showing has been made. *Id.* At the very least, there must be some rational relation between the substance of the statute and its purpose. *Turner v. Fouche*, 396 U.S. 346, 362 (1970); *Reed v. Reed*, 404 U.S. 71 (1971); *Stanton v. Stanton*, 421 U.S. 7 (1975).

[10] No other state has an "on demand" special jury. Instead, in each of the other three states with special juries applicable to civil cases, New Jersey, N.J. Ann. § 2A:75-1 (West); Virginia, Va. Code § 8.01-362; West Virginia, W. Va. Code § 56-6-13, use of the special jury is discretionary with the trial court upon a showing of the need for such a jury. Thus, if the strict scrutiny standard of review is applied the statute clearly falls. And, even if the traditional "rational relation" standard is applied the statute still does not measure up since there is no rational reason for allowing a "special" jury for any and all cases without regard to their nature or complexity.

1960)) and has become an "instrument of the economically and socially privileged" (*Thiel*, 328 U.S. at 224)), then how can that practice be comparable with basic principles of democratic self government? And if such a practice can be constitutionaly reconciled with democratic values, then on what basis? If the rationale for special juries is that they are necessary in complex cases not capable of resolution by average jurors, see Luneburg and Nordenberg, *Specially Qualified Jurors and Expert Non-Jury Tribunals: Alternatives for Coping with the Complexities of Modern Litigation*, 67 Va.L.Rev. 887 1981),[11] Note, *The Case for Special Jurors in Complex Civil Litigation*, 89 Yale L.J. 1155 (1980), then how can a statute such as Delaware's survive even under the traditional "rational relation" review standard, where it is available in any case on demand?

The first two questions merit review by this Court for a second reason. This Court last addressed the constitutionality of a special jury statute 35 years ago in *Fay v. New York*, 332 U.S. 261 (1947) where it upheld the New York special jury statute. Since then, more recent pronouncements of this Court have severely eroded the constitutional rationale of the *Fay* decision. *Taylor v. Louisiana*, 419 U.S. 552 (1975), *Duren v. Missouri*, 439 U.S. 357 (1979) (exclusion of women from jury panels), *Peters v. Kiff*, 407 U.S. 493 (1972) (standing to raise exclusion of cognizable groups). Even the Delaware Supreme Court has characterized the *Fay* decision as "questionable". A.21a. To the extent that *Fay* were thought to be controlling in this case—and it is not[12]—this Court should address frontally the issue of whether *Fay* remains viable.

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[11] *See also* 65 *Judicature*, Nos. 8-9 (March-April 1982) and *In Re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980).

[12] *Fay*, which acknowledged that a "dual system of juries prevents easy possibilities of violation of the Fourteenth Amendment," 332 U.S. at 265, is distinguishable from this case because the

B.

The third question merits review by this Court because even if there is a place in the American system of justice for special juries, the Delaware special jury system, as it is practiced, is constitutionally intolerable and must be eradicated. In this case there was deliberate exclusion of otherwise qualified young (under 30) [13] and old (over 70) jurors from the jury panel. A.121a. The panel was totally dominated (84%), A.118a, by college educated persons, with gross disproportion of males and whites, A.118a. No single one of these exclusions or disproportions is compatible with present day constitutional norms for jury selection. *Peters, supra; Thiel, supra; Brown v. Allen*, 344 U.S. 443, 474 (1953); *Turner v. Fouche*, 396 U.S. 346 (1970); *Castaneda v. Partida*, 430 U.S. 482 (1977). If this practice is countenanced by permitting the Delaware Supreme Court decision to escape constitutional review (or by allowing it to stand), then this shocking departure from standards of fundamental procedural fairness will remain the last word on the minimum protections states are required to afford litigants in civil jury trials.

C.

The fourth question challenges, under the Equal Protection Clause, the power of a state court to deny relief to litigants exposed to constitutionally infirm jury selection procedures. This question is substantial because at stake is the very integrity of both the fact finding and judicial review processes.

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special jury there was available only after a determination by the trial judge in his "sound discretion that it was appropriate to the case." *Id.* at 268-69.

[13] The First, Fifth and Seventh Circuits have found young adults to constitute cognizable groups in the community. *United States v. Butera*, 420 F.2d 564, 571 (1st Cir. 1970); *Ciudadanos Unidos De San Juan v. Hidalgo County*, 622 F.2d 807, 819 (5th Cir. 1980); *Chase v. United States*, 468 F.2d 141, 146 (7th Cir. 1972).

In prior cases the Delaware Supreme Court had recognized that the Delaware special jury system resulted in "defendants' juries". *Nance v. Rees*, 161 A.2d 795, 798 (Del. 1960); *Robelen Piano Co. v. DiFonzo*, 172 A.2d 568, 571 (Del. 1961). In this case the Delaware Supreme Court found that the special jury system was so "arbitrary", A.24a., "potentially discriminatory", A.24a., and with the representation of women so statistically "suspect", A.22a., that it barred the impaneling of future special juries pending lower court promulgation of rules for selection of special jurors. By so doing the Delaware Supreme Court recognized the necessity of affording relief to future litigants, which was tantamount to acknowledging a violation of constitutional principles in this case. Yet the court refused to grant that same relief to the parties before it whose efforts benefited future litigants and who had been equally victimized by the infirmities of the special jury selection procedure. Since "[i]t is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted . . .," *Marbury v. Madison*, 1 Cranch 137, 175 (1803), the court must articulate some legitimate basis for denying these litigants relief. On what constitutional basis, and under what principle of fairness should an appellate court be permitted to discriminate against litigants in that fashion?

While this Court has held that in certain instances purely prospective relief may be appropriate, *Linkletter v. Walker*, 381 U.S. 618, 622 (1967), this Court has been careful to articulate the reasons for prospective application. *Stovall v. Denno*, 388 U.S. 293, 297 (1967). And, where, as here, the constitutional defect found went to the integrity of the fact-finding process, this Court has customarily granted relief to the parties before it. *Jackson v. Denno*, 378 U.S. 368 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

In the case at bar the Court inexplicably confined the granting of relief to unknown future litigants. And even

the relief granted them falls far short of constitutional standards. The criteria the Delaware Supreme Court has directed the trial courts to use in promulgation of special jury rules will perpetuate the unconstitutional exclusion of otherwise qualified jurors from on-demand special juries. These unacceptable criteria—age, occupation, and education (minimum requirement of college degree)—will surely result in another attack on the constitutionality of the Delaware system.

Only this Court can now rectify the unusual efforts of the Delaware court to deny relief to these litigants and simultaneously preserve an outmoded and unfair civil jury process by asserting the supremacy of federal constitutional mandates over a fundamentally unfair state civil jury process.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Dated: December 21, 1982

Office-Supreme Court, U.S.
FILED
DEC 21 1982
ALEXANDER L. STEVAS,
CLERK

82-1053

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LILLIAN M. HAAS, Personal Representative of the Estate of and parent and next of kin of John V. Cataldi, deceased; CHERYL RUFF, personal representative of the Estate of and widow of and next of kin of Edwin J. Ruff, Jr., deceased; BETTY LOU SCHLECTIC BAHE, as guardian and next friend of Ginger Schlectic, minor child of Ralph C. Schlectic, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS, personal representative of the Estate of and widow of and next of kin of Mark Lamascus, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS as guardian and next friend of Sarah Laine Lamascus and Mark David Lamascus, minor children of Mark Lamascus, deceased,

Appellants,

v.

UNITED TECHNOLOGIES CORPORATION, a Delaware corporation,

Appellee.

On Appeal from the Supreme Court of Delaware

APPENDIX TO JURISDICTIONAL STATEMENT

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[OPINION OF THE DELAWARE SUPREME COURT
Dated August 25, 1982]

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. 114, 1981

LILLIAN M. HAAS, *et al.*,
Plaintiffs Below, Appellants,

v.

UNITED TECHOLOGIES CORPORATION,
a Delaware Corporation,
Defendant Below, Appellee.

Submitted on reargument before
the Court en banc: June 21, 1982 *
Decided: August 25, 1982

Before MCNEILLY, QUILLEN, HORSEY and MOORE,
Justices, constituting the Court en banc

Upon appeal and cross-appeal from Superior Court. Affirmed.

Arthur Inden, Ben T. Castle (Argued), Craig A. Karsnitz and Barry M. Willoughby, of Young, Conaway, Stargatt & Taylor, Wilmington; and Francis A. Ferrara of Kassab, Cherry, Curran & Archbold, Media, Pa., for plaintiffs below, appellants.

Edmund N. Carpenter, II (Argued), Allen M. Terrell and Helen L. Winslow, of Richards, Layton & Finger, Wilmington, for defendant below, appellee.

MCNEILLY, Justice:

In this product liability case, we consider an appeal and cross appeal [1] from a jury verdict and judgment adverse to

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* This opinion supercedes a previous opinion, issued by the Court en banc on March 15, 1982, which is hereby withdrawn.

[1] Defendant cross appeals from the Trial Court's denial of a Motion for a Directed Verdict with respect to certain issues bear-

plaintiffs in the Superior Court. Two principal issues are presented for our view: (1) Did the Trial Judge, in his instructions to the jury, improperly preclude the jury from determining whether a helicopter manufactured by the defendant was defective for failure of its design to incorporate an in-cockpit instrument which could warn a pilot, while in flight, that a helicopter rotary blade was losing pressure and in danger of cracking; and (2) Was the application of the Special Jury statute a violation of 10 *Del.C.* §§ 4501 and 4503 and the Due Process and Equal Protection clauses of the Federal and State Constitutions? We affirm.

I

This case, as with many products liability cases, has its origins in tragedy. On January 8, 1975, while enroute from New River, North Carolina to McGuire Air Force Base in New Jersey, a CH-53D Sea Stallion helicopter, manufactured by defendant's Sikorsky division, crashed near Salisbury, Maryland killing all five servicemen on board. Four of the men were Marine Corps crewmen.[2] The fifth serviceman was a member of the Air Force who was hitching a ride to the air base. Plaintiffs are the surviving spouses, children and personal representatives of the decedents. The parties agree that the helicopter crashed when one of its six rotors fractured in flight.

A.

Before we focus on the issues, some background information about defendant's aircraft is needed. The rotors on the Sea Stallion helicopter were hollow and were pressurized with nitrogen. If a crack developed in one of the rotor blades, or spars, the nitrogen would seep out leaving the spar depressurized. Of course, a loss in blade pressure

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ing upon liability. In view of our conclusions herein, we do not reach the issues raised by defendant in its cross-appeal.

[2] The death of one of these airmen, the co-pilot, is not at issue in this case.

while the aircraft was flying could be, and in this unfortunate case was, symptomatic of a crack, thus resulting in a crash and loss of life.

To forestall such occurrences, Sikorsky equipped the CH-53D helicopter with a safety device called a "BIM"—short for "Blade Inspection Method." The BIM utilized a gauge located at the base of each spar. If the rotor was fully pressurized, the gauge registered white; if the rotor was not fully pressurized, the gauge registered black. The gauge could only be inspected when the helicopter was on the ground with its blades stationary. Operation of the helicopter normally included a pre-flight check of all gauges. No inspection of the gauges was possible while the aircraft was airborne. The helicopter was not equipped with an in-cockpit warning device that would signal a blade crack while the helicopter was in flight.

B.

The parties agree that since the deaths of the servicemen occurred in Maryland, the law of that State is controlling. See Maryland Wrongful Death Act, Md. Code Ann., Cts & Jud. Proc. § 3-901 et seq. (1980). In *Phipps v. General Motors Corp.*, Md. Ct. App., 363 A.2d 955 (1976), Maryland's highest Court adopted Restatement (Second) of Torts § 402 A (1965) and its rationale of strict liability in tort for defective products. See *Singleton v. International Harvester Co.*, 4th Cir., —— F.2d —— (1981) (applying § 402 A as law of Maryland in defective design case).

Section 402 A reads:

> "Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller." *Id.*

The Maryland Court of Appeals adopted a seven factors test for determining whether a product was defectively designed under § 402 A. Those factors are:

"'(1) the usefulness and desirability of the product. (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.'"

Phipps v. General Motors Corp., 363 A.2d at 959, *quoting* Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965).

After *Phipps*, then, a balancing test weighing the advantage and disadvantages of the allegedly defective design vis-a-vis an alternate design must be performed.

C.

The theory of plaintiffs' case at trial was that defendant's helicopter was defective in design under Restate-

ment (Second) 402A, supra, because it lacked an in-cockpit warning device and that this design defect rendered the helicopter fundamentally unsafe and ultimately caused the deaths of plaintiffs' decedents. We summarize the evidence bearing upon this contention.

Plaintiffs introduced evidence showing that an in-cockpit warning device for blade pressure was a necessary component of a helicopter designed for long-range flights and that such a system was available for use in certain other helicopter models. Although there was evidence that the CH-53D model in question was only designed with short range flights in mind, (i.e. flights of less than 5 hours) plaintiffs presented evidence that long range flights were contemplated by virtue of fuel extension tanks and a "hot refueling" technique. Provisions for the use of the fuel extension tanks were included in the specifications. "Hot refueling" was a method by which the helicopter could take on fuel while on the ground without the pilot having to shut off the engines, but precluding an inspection of the BIM gauges even though the aircraft was on the ground.

Defendant countered with evidence: (1) that cockpit BIMs were unreliable and dangerous because a false warning of loss of blade pressure might cause a pilot to bail out or attempt to land his aircraft in rough terrain unnecessarily damaging or destroying it in the process; and (2) that defendant repeatedly recommended installation of cockpit BIMs in the Sea Stallions upon learning that they were being used for long range flights exceeding two hours, but that those recommendations were unheeded by military authorities.

Defendant's defense of plaintiff's allegation of defective design by showing that the helicopter BIM system was an adequate safety device and that the negligence of both the air and maintenance crews resulted in the crash. To that end, defendant introduced evidence that the helicopter BIM showed black on each of the four days prior to the

helicopter's ill-fated flight, and that the crew failed to remove and replace the depressurized spar despite such warnings and despite the mandate of the maintenance instruction manual. Instead, the spar was simply repressurized and the spars left in the at rest position during which there would normally be no depressurization through loss of nitrogen even though a crack in the spar itself was evident. There was also a lack of evidence concerning the ground crew's performance of a preflight "start up and stop" blade pressure check. Defendant also relied on the testimony of a Marine Corps officer, who, on the issue of the maintenance crew's failure to heed four days of black BIM warnings, conceded that "we had just missed it."

To parry defendant's argument and buttress their own claim that the helicopter without a cockpit BIM was fatally defective, plaintiffs presented testimony concerning the inability of the helicopter's BIM system to distinguish between a loss of pressure due to a cracking blade and a drop in pressure resulting from a defect in the BIM system itself, such as a leaking pressure gauge. Plaintiff claimed that a "boy crying wolf" attitude developed among the maintenance crews because of repeated false warnings caused by the defective pressure gauges themselves.

Upon reviewing the sufficiency of the evidence, the Trial Judge found that there was a jury question presented on whether the absence of a cockpit warning device constituted a design defect and necessarily denied defendant's Motion for a Directed Verdict on the issue of liability.[3] We agree that there was a jury question on this issue. Restatement (Second) of Torts § 402A, supra. Compare *Roy v. Star Chopper Co., Inc.*, D.R.I., 442 F.Supp. 1010, 1020 (1977), *aff'd*, 5th Cir., 584 F.2d 1124 (1978), *cert. denied*, 440 U.S. 916, 99 S.Ct. 1234

[3] The Trial Judge directed a verdict for defendant on certain other issues; however, that ruling is not contested in this appeal.

(1978); *Foster v. Ford Motor Co.*, 5th Cir., 616 F.2d 1304, 1309-11 (1980); *Schnell v. AMG, Inc.*, 3rd Cir., 567 F.2d 1259, 1261 (1977); *Dorsey v. Yoder Co.*, E.D. Pa., 331 F.Supp. 753, 760 (1971); *Azzarello v. Black Bros. Co., Inc.*, Pa. Supr., 391 A.2d 1020, 1027 (1978); *Bexiga v. Havis Mfg. Corp.*, N.J. Supr., 290 A.2d 281, 285 (1972). The question remains, however, whether the Trial Court, in its jury instructions, properly submitted the issue of design defect for lack of a cockpit BIM to the jury or whether, as plaintiff asserts, the Court effectively precluded the jury from considering that issue by those same instructions.

II

A.

Plaintiffs proposed the following jury instructions on the design defect issue:

> "Even had the visual 'BIM' system worked properly, Plaintiffs allege, it was inadequate and unsafe as a warning device since there was no 'inside-the-cockpit BIM' indictor to warn the helicopter's crew in flight of a crack in the blade. Since there was no system for warning the crew in flight of an impending blade fracture, Plaintiffs contend that the Sikorsky-built helicopter was defective.
>
> If you find that the Sikorsky-built helicopter required a warning system for potential blade fractures in order for it to be operated safely, and if you find that the visual 'BIM' system was defective in this regard, either because it did not work as a warning system or because there was no 'inside-the-cockpit BIM' then you should find that the helicopter was defective."

The instructions actually given to the jury by the Trial Judge read, in pertinent part, as follows:

"Plaintiffs' claim of strict liability against Defendant Sikorsky is based on their contention that the crash was caused by an unreasonably dangerous defective condition in the helicopter. When I refer to "the helicopter" in this context, I also mean its warning system and the flight and maintenance manuals that accompany—accompanied it.

In order to recover against Defendant Sikorsky on this claim, the Plaintiffs must establish, by a preponderance of the evidence, the following four essential elements:

(1) the product was in a defective condition at the time that it left the possession or control of the manufacturer;

(2) that it was unreasonably dangerous to the users;

(3) that the defect was a proximate cause of the deaths; and

(4) that the product was expect [sic] to and did reach the user without substantial change in its condition.

A 'defect,' as I will use that term in these instructions, is a condition not contemplated by the ultimate user, which will be unreasonably dangerous to him.

In this connection, I call to your attention that certain witnesses have been asked whether their product did or did not have a defect. Their use of the term may or may not have coincided with the definition of that term that I have just given you. In your deliberations, you must of course apply the legal definition of the term, as just given.

An 'unreasonably dangerous' product is one which is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product.

In order to determine that the helicopter in question was unreasonably dangerous in design, you must find that, at the time of manufacture, the likelihood that it would cause harm, and the seriousness of the harm, outweighed the burden on the manufacturer to design a product that would have prevented such harm, and the adverse effect that alternative design would have on the usefulness of the product.

Examples of factors that you may consider in making this evaluation include:

—any warnings and instructions provided with the product;

—the tehnological [sic] and practical feasibility of a product designed and manufactured so as to have prevented the harm while substantially serving the likely user's expected needs. In considering this you may consider the state of the art at the time that the product was designed and manufactured.

—the effect of any proposed alternative design on the usefulness of the product;

—the comparative costs of producing, distributing, selling, using, and maintaining the product as designed and as alternatively designed;

—the new or additional harms that might have resulted if the product had been so alternatively designed;

—the usefulness and desirability of the product;

—the availability of other and safer products to meet the same need;

—the likelihood of injury and its probable seriousness;

—the obviousness of the danger;

—the avoidability of injury by care in use of the product (including the effect of instructions or warnings);

—the ability to eliminate the danger without seriously impairing the usefulness of a product and making it—that is, or making it unduly expensive.

The Plaintiffs contend that the visual BIM warning system was inadequate because it did not incorporate any warning in the cockpit, it lost credibility as a result of warnings that did not indicate a crack in the blade, and the instructions and warnings in the flight and maintenance manuals were inadequate.

The Defendant disputes each of these contentions.

In order to prevent the helicopter from being unreasonably dangerous, Sikorsky was required to design an adequate warning system and to give adequate directions as to its maintenance and use. Although a manufacturer is required to design a product that is not defective and unreasonably dangerous, this does not mean that it is required to include every possible safety device. Thus, if you find that the visual BIM system and applicable manuals were adequate, you may not find Sikorsky liable for failure to install an indicator in the cockpit.

In order to determine that the product was defective and unreasonably dangerous because adequate warnings and instructions were not provided about a danger connected with the helicopter or its proper maintenance or use, you must find that, at the time of manufacture, the likelihood that the product would cause harm and the seriousness of the harm rendered the manufacturer's instructions inadequate, and that the manufacturer should and could have provided the instructions or warnings which the Plaintiffs allege would have been adequate.

Examples of factors that you may consider in making this evaluation include the intended or reasonably anticipated use of the product; the manufacturer's ability, at the time of manufacture, to be

aware of the product's danger and the nature of the potential harm; the manufacturer's ability to anticipate that the likely product user would be aware of the product's danger and the nature of the potential harm; the technological and practical feasibility of providing adequate warnings and instructions; the clarity and conspicuousness of the warnings or instructions that were provided; the adequacy of the warnings or instructions that were provided; whether reasonably prudent persons who are likely to maintain and use the product should be expected to understand and follow the warnings and instructions.

If you find that the warnings and instructions at the time of manufacture were not adequate, and that this was a proximate cause of the crash, then your verdict should be for the Plaintiffs. On the other hand, if you find that the warnings and instructions at the time of manufacture were adequate, and that the crash would have been avoided if they had been followed, then your verdict should be for the Defendant."

After the jury was so instructed, plaintiffs excepted to the "language which makes Sikorsky liable for failure to install an indicator in the cockpit contingent upon a finding that the visual BIM was inadequate." Plaintiffs repeated this objection in a Motion for a New Trial. The Trial Judge viewed his instructions as a correct statement of the substantive law of Maryland in design defect cases and as a proper submission of the cockpit BIM issue to the jury and denied the motion.

Plaintiffs complain in this appeal that the instructions given improperly predicated jury consideration of the cockpit BIM upon a finding by the jury that the "visual BIM system and applicable manuals" were inadequate. In other words, the plaintiffs argue that the jury was

erroneously instructed to disregard any consideration of the cockpit BIM at all unless it found, initially, that the visual BIM system was an inadequate safety device. Plaintiffs single out the following sentence of the above quoted instructions as the culprit in allegedly leading the jury astray in its deliberations: "Thus, if you find that the visual BIM system and applicable manuals were adequate, you may not find Sikorsky liable for failure to install an indicator in the cockpit."

B.

We do not accept plaintiffs' construction of the jury charge and find to the contrary that the Trial Judge's instructions did not effectively confuse or withdraw the cockpit BIM question from the jury.

The test for determining the propriety of a jury instruction does not demand perfection. In general, a trial court's instructions will not be the basis for reversible error if they "are reasonably informative and not misleading, judged by common practices and standards of verbal communication." *Baker v. Reid*, Del. Supr., 57 A.2d 103, 109 (1947). See also *Storey v. Castner*, Del. Supr., 314 A.2d 187, 194 (1973). But if the alleged impropriety in the jury instructions "undermined . . . the jury's ability to 'intelligently perform its duty in returning a verdict,' " this Court will reverse. *Newman v. Swetland*, Del. Supr., 338 A.2d 560, 562 (1975), *quoting Storey v. Castner*, 314 A.2d at 194. In judging the propriety of a jury charge, the entire instruction is considered with no statement to be viewed out of context. *Spahn v. People's Ry. Co.*, Del. Supr., 92 A. 727, 729 (1912); *Baker v. Reid*, 57 A.2d at 109. See also *Franklin v. Salminen*, Del. Supr., 222 A.2d 261, 263 (1966). "[S]ome inaccuracies and inaptness in statement are to be expected in any charge." *Baker v. Reid*, 57 A.2d at 109.

Viewed in its entirety, as it must, the jury charge is an accurate reflection of Maryland law applicable to de-

fective design cases. See *Singleton*, supra; *Phipps*, supra. The jury was directed to undertake the balancing test and weigh those factors, approved by the *Phipps* Court and reiterated in *Singleton*, bearing upon the safety of the helicopter as designed with the helicopter alternately designed, *i.e.*, with a cockpit BIM. Thus, the jury charge squarely presents the issue of cockpit BIM to the jury. Those passages from the instructions which we have quoted above direct the jury to look at other safety devices in evaluating the adequacy of the visual BIM as a safeguard for human life. The only alternative safety device discussed throughout the course of the trial and, therefore, the only alternative to be considered by the jury was the cockpit BIM. Thus, the Trial Judge was commanding the jury to consider the availability, safety, feasibility and cost of the cockpit BIM at the same time that it was reviewing the adequacy of the visual BIM system. As is evident from the instructions the Trial Court also reminded the jury of plaintiffs' contention on the cockpit BIM question. In light of the instructions taken as a whole, it would not be fair or reasonable to focus in on one passage of the charge and stretch it into a basis for reversal. Indeed, under the Delaware authorities cited above, we cannot do so. Maryland law is the same. See *Beahm v. Shortall*, 368 A.2d 1005 (1977); *Clayborne v. Mueller*, 291 A.2d 443 (1972); *Nora Cloney & Co. v. Pistorio*, 248 A.2d (1968); *West v. Belle Isle Cab Co.*, 100 A.2d 17 (1953); *Rabmovitz v. Kilner*, 112 A.2d 483 (1955). We read the word "adequate" in the line which plaintiffs assail as requiring the jury necessarily to evaluate the cockpit BIM factor *in connection with* their evaluation of the visual BIM. The jurors were *not* instructed to focus their attention on the visual BIM only excluding all consideration of the cockpit BIM. In our view the instructions did not prohibit the jurors from reaching the cockpit issue unless, as plaintiffs believe, they first ascertained that the visual BIM by itself was inadequate.

Moreover, it is difficult for this Court to believe that the jury did not consider the cockpit BIM issue when the bulk of counsel's efforts and reams of testimony over the course of the two week trial were specifically directed to the respective virtues and disabilities of the cockpit and visual BIMs. The jurors were reminded repeatedly in the opening arguments of counsel, through the presentation of evidence (summarized above at length), in the closing arguments of counsel, and in the charge itself that cockpit BIM was a factor to be taken into account in deciding whether defendant's helicopter was defective. Hence, we stand convinced that the instructions did not mislead nor withdraw that issue from the jury. Any impreciseness in the one line of the jury charge complained of was cured by the instructions viewed as a whole and is not the basis for a reversal here.

III

We now turn to the second issue, namely, whether the application of the Delaware Special Jury Statute to the facts of this case violated 10 *Del.C.* § 4501 [4] and 4503 [5] and the Due Process and Equal Protection clauses of the Federal and State Constitutions.

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[4] 10 *Del.C.* § 4501 provides:

"It is the policy of the State that all litigants in state courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the county wherein the court convenes. It is further the policy of the State that all citizens shall have the opportunity to be considered for service on grand and petit juries in the courts of the State, and shall have an obligation to serve as jurors when summoned for that purpose."

Id.

[5] 10 *Del.C.* § 4503 provides:

"No citizen shall be excluded from service as a grand or petit juror in the courts of the State on account of race, color, religion, sex, national origin or economic status."

Id.

A.

Specifically, plaintiffs contend that the application of the Special Jury Statute (Statute) in this case deprived them of due process and equal protection of the law because the Statute does not contain objective criteria for selection of the pool of individuals from which the special jury was drawn and because the Prothonotary allegedly excluded certain identifiable groups (women and young people) from the pool arbitrarily. Plaintiffs also ask that we overrule this Court's decision in *Nance v. Rees*, Del. Supr., 161 A.2d 795 (1960), wherein the constitutionality of the Delaware Special Jury Statute was upheld against a challenge on due process grounds. Second, plaintiffs argue that the Statute must be reexamined in light of the enactment of 10 *Del.C.* §§ 4501 and 4503 which call for non-discriminatory and random selection of grand and petit juries to ensure representation of a fair cross section of the county in which the court convenes.

Defendant Sikorsky asserts that both the United States Supreme Court and this Court have upheld the constitutionality of special juries, that §§ 4501 and 4503 apply only to grand and petit juries and not to special juries, and that the Statute as applied below was fair to all parties and violated neither the Due Process nor Equal Protection clauses of the Federal and State Constitutions.

B.

Provision for special juries is made in 10 *Del.C.* § 4541. The Delaware Special Jury Statute reads:

> "(a) A special jury for the trial of a cause, shall be ordered by the Court upon the application of either party.
>
> (b) The party applying for the special jury under this section shall give due notice to the opposite party, and to the Prothonotary, of the time and place

of striking such jury. At such time and place the Prothonotary, or his deputy, or if the Prothonotary is not indifferent between the parties, then 2 proper persons indifferent between the parties, appointed by the Superior Court, shall attend with a list of 48 indifferent and judicious citizens of the county, qualified to serve as jurors, showing their names and places of abode.

(c) The party applying for the special jury under this section, his agent or attorney, shall first strike out one of the names, and then the opposite party, his agent or attorney, shall strike out another; and so on, until each shall have struck out 12. If the opposite party, or any person on his behalf, shall not attend, or shall refuse to strike, the Prothonotary or his deputy, or the persons appointed to strike the jury, as the case may be, shall strike for the party not attending, or refusing to strike.

(d) After each party shall have struck 12 names under this section, the remaining 24 persons on the list shall be the jury to be returned for the cause. The Prothonotary, or his deputy, or the persons appointed to strike the jury, as the case may be, shall thereupon deliver to the sheriff a certified list of the names of such persons, with their places of abode, as the jurors to be summoned for the cause, annexed to a venire facias commanding him to summon them. The sheriff shall, thereupon, summon the persons named, according to the command of the writ, and shall return the list with the venire."

Id.

A special jury is impanelled as follows:

"At the trial of the cause, a special jury shall be drawn from the list, returned under § 4541 of this title, in the manner provided in this chapter for other cases. In the selection of a special jury, if

> any of the 24 persons remaining on the list as provided in § 4541 of this title, are unable to sit as jurors, for any reason satisfactory to the Court, the Court may in its discretion limit the challenges by each party to not less than 3. If the panel is reduced, however, to less than 18, the Court shall dismiss the jury, unless the party requesting the special jury waives sufficient of his challenges to permit a jury to be selected. The costs of the special jury so dismissed in such case shall be borne by the party requesting the special jury."
>
> *Id.* § 4542.

The procedure for requesting a special jury is governed by Superior Court Rule 40(b) which provides:

> "Application for a special jury shall be made at or before the marking of the case for trial. A party who has applied for a special jury may withdraw such application and have the case tried by the general jury, provided that the granting of such withdrawal will not unduly prejudice or inconvenience an opposing party."
>
> *Id.*

In *Nance*, supra, this Court, after reviewing the history of special juries in Delaware and England before 1776, concluded that the Statute violated neither the Due Process clause of the Federal Constitution nor the right to trial by jury provision of Article I, § 4 of the Delaware Constitution. In considering plaintiffs' request that *Nance* be overturned, we draw liberally from our discussion on the development of the special jury procedure contained therein.

Special juries, commonly referred to as "blue ribbon" or "struck" juries, were first provided for in Delaware in An Act for Regulating the Trial of Causes by Special Juries, 4 *Del. Laws* c. CXX, at 322 (1810). The practice

of using special juries, however, existed before enactment of this law. For example, struck juries were discussed in Rule 17 of the Delaware Supreme Court, 1 Del. Cas. XL (1790),[6] briefly referred to in An Act For More Certainly Obtaining Returns of Special Juries, And Their Better Regulation, 2 *Del. Laws* c. VIIIc, at 1071 (1793) and are noted in several of Delaware's oldest reported cases decided shortly after the American Revolution. See *Burton's Lessee v. Prettyman*, Del. Supr., 1 Del. Cas. 11 (1793); *Newbold's Lessee v. Stokley*, Del. Supr., 1. Del. Cas. 10 (1793); *Polk's Lessee v. Ross*, Del. Com. Pl., 1 Del. Cas. 40 (1794). The procedure for selecting a special jury has also been discussed by Delaware courts in more recent times. See *Robelen Piano Co. v. DiFonzo*, Del. Supr., 172 A.2d 568 (1961); *Sharpe v. Thompson*, Del. Super., 147 A.2d 649 (1958); and *O'Mallie v. Harlan & Hollingsworth*, Del. Super., 99 A. 428 (1916).[7]

The special jury is not an American invention. It was well known in English common law and one scholar has traced it back to the 14th century. Thayer, *The Jury and Its Development*, 5 Harv. L. Rev. 295 (1889). The *Nance* Court placed the probable origin of the 1810 Delaware statute in an English statute, 2 Geo. II. c.25, and stated that "the Act of 1810 did no more than codify into statutory law a practice long followed in Delaware courts as a part of the legal heritage from England." *Nance v. Rees*, 161 A.2d at 799.

Special juries were originally struck in cases "of too great nicety" for an ordinary panel and to prevent sus-

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[6] Under the Delaware Constitutions of 1776 and 1792, the Delaware Supreme Court was a Court of original jurisdiction. Del. Const. art. VI, § 8 (1792); Del. Const. art. XVII (1776).

[7] For a discussion of past Delaware procedure with respect to requesting a special jury, see 1 *Wooley, on Delaware Practice*, § 561, at 402-03.

pected partiality. III *Blackstone's Commentaries* § 357 (Sharswood ed.) Although they have been the subject of much debate in scholarly literature [8] and have suffered a certain amount of judicial criticism,[9] the special jury as an institution is ensconced in Delaware law and is not constitutionally infirm.

C.

Having reiterated our belief that the Delaware Special Jury Statute is constitutional on its face, we now consider whether the Statute is constitutional as applied.

The United States Supreme Court has heard many challenges to Federal and state jury selection practices. Typically, such challenges were founded upon allegations that the selection procedures purposefully and intentionally excluded a certain group of qualified jurors and, consequently, the jury panel did not represent a fair cross section of the community. Those challenges have been brought under: the Sixth Amendment (right to a speedy and public trial in criminal actions before an impartial jury), see e.g. *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664 (1979), and *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692 (1975); the Fifth Amendment (right to indictment by a grand jury in Federal felony actions, see, e.g., *Casterada v. Partida*, 430 U.S. 482, 508-18, 97 S.Ct. 1272, 1287-92 (1977) (Powell, J., dissenting); *Peters v. Keff*, 407 U.S. 493, 92 S.Ct. 2163

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[8] See, e.g., Luneburg & Nordenberg, *Specially Qualified Juries and Expert Non Jury Tribunals: Alternatives for Coping With the Complexities of Modern Civil Litigation*, 67 Va.L.Rev. 887 (1981); Baker, *In Defense of the "Blue Ribbon" Jury*, 35 Iowa L. Rev. 409 (1950); Thatcher, *Why Not Use the Special Jury"?* 31 Minn. L. Rev. 232 (1947); Note, *The Case for Special Juries in Complex Civil Litigation*, 89 Yale L.J. 1155 (1980).

[9] See *Moore v. New York*, 333 U.S. 565, 569-70, 68 S.Ct. 705, 707 (1948) (Murphy, J., dissenting); *Fay v. New York*, 332 U.S. 261, 296-300, 67 S.Ct. 1613, 1632-34 (1947) (Murphy, J., dissenting); *Robelen Piano Co. v. DiFonzo*, 172 A.2d at 571.

(1972); and the Due Process and Equal Protection clauses of the Fourteenth Amendment, see e.g., *Alexander v. Louisiana*, 405 U.S. 625; 92 S.Ct. 1221 (1972), and *Aikens v. Texas*, 325 U.S. 398, 65 S.Ct. 1276 (1945).

The Supreme Court has reiterated the basic principle that a jury must be drawn from a pool that is truly representative of a cross-section of the community. See *Taylor v. Louisana*, 419 U.S. at 527-28; *Thiel v. Southern Pacific R.R.*, 328 U.S. 217, 220, 66 S.Ct. 984, 985 (1946); *Glasser v. United States*, 315 U.S. 60, 85, 62 S.Ct. 457, 471 (1942). The absence of any cognizable or identifiable group from the jury or jury pool, however, does not offend the Constitution unless it is the result of a systematic exclusion of that group. *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628 (1972) (White, J., plurality opinion); *Thiel, supra*, 328 U.S. at 220 or purposeful discrimination. *City of Mobile v. Boulden*, —— U.S. ——, n.24, 100 S.Ct. 1490, 1505 n.24 (1980); *Akins v. Texas*, 325 U.S. 398, 65 S.Ct. 1276 (1945).

The United States Supreme Court has examined and upheld the constitutionality of state special jury statutes on several occasions. See *Moore v. New York*, 333 U.S. 565, 68 S.Ct. 705 (1948); *Fay v. New York*, 332 U.S. 261, 67 S.Ct. 1613 (1947); *Brown v. New Jersey*, 175 U.S. 172, 20 S.Ct. 77 (1899). However, these cases involved challenges to the special jury statute by a defendant in a *criminal* context. The Supreme Court has not yet reviewed the constitutionality of a special jury statute in a *civil* setting. The one Supreme Court case dealing specifically with a challenge to a civil jury did not involve a blue ribbon jury and was decided not on constitutional grounds, but upon the supervisory power of the Court over the administration of justice in the Federal system. *Thiel v. Southern Pacific R.R.*, supra.[10]

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[10] It should be noted that the Supreme Court has heard and decided two class action civil suits brought by persons who alleged that state jury selection procedures unconstitutionally excluded

Moreover, cases based upon the Fifth and Seventh Amendments do not apply here because those Amendments have not been held applicable to the States under the Fourteenth Amendment (and the Fifth Amendment right to a Grand Jury is clearly not applicable in a civil case). See *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163 (1972) (Marshall, J., plurality opinion); *McLancon v. McKeithen*, E.D.La., 345 F.Supp. 1025 (1972), *aff'd sub nom., Davis v. Edwards*, 409 U.S. 1098, 93 S.Ct. 908 (1973). Furthermore, it is not clear that the same Due Process and Equal Protection standards applicable to jury selection in a criminal trial would be applicable in a civil trial. Luneburg & Nordenberg, *Specially Qualified Juries and Expert Non Jury Tribunals: Alternatives for Coping With the Complexities of Modern Civil Litigation*, 67 Va.L.Rev. 887, 922-26 (1981).[11] And the most recent Supreme Court case upholding a state special jury selection procedure in a criminal context is more than thirty years old, and its validity today, in light of recent cases, is questionable.[12]

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them from grand and petit jury service and from service on the County Board of Education (because the Board was selected by the grand jury). *Carter v. Jury Comm'rs*, 396 U.S. 320, 90 S. Ct. 518 (1970); *Turner v. Fouche*, 396 U.S. 346, 90 S. Ct. 532 (1970). Although not specifically attacks on the selection of a civil jury, arguably they were challenges to the procedure for selecting civil and criminal juries. In *Carter*, the Court found as a constitutional right that the source of the jury selection list reasonably reflect " 'a cross section of the population suitable in character and intelligence for that civil duty.' " 396 U.S. at 333-34, *quoting Brown v. Allen*, 344 U.S. 443, 474, 73 S. Ct. 397, 416 (1953).

[11] The Supreme Court has stated that the reasons for trial by jury in a criminal context and in a civil context are different. For example, in *Colgrove v. Battin*, 413 U.S. 149, 93 S. Ct. 2448 (1973), the Court stated that the purpose of trial by jury in a criminal case is to prevent oppression by the government, and in a criminal *and civil* case to assure fair and equitable resolution of factual issues.

[12] For example, *in Fay v. New York*, supra, the Supreme Court did not find a constitutional problem with selecting only those

To support their contention of intentional, purposeful, arbitrary and systematic exclusion of women and young people from the jury pool, plaintiffs rely on statistics which show that the population of New Castle County was 53% female, that the jury pool was only 33.9% female, that the jury panel in this case was only 16% female, and that the youngest member of this struck jury was 37. Assuming, for the sake of argument, that the standards discussed above are applicable to this civil special jury case, we conclude that plaintiffs have not made out a case for unconstitutional exclusion of identifiable groups from the special jury. The figures submitted by plaintiffs may be suspect but do not show intentional and systematic exclusion. And as we stressed earlier, a criminal defendant is not constitutionally entitled to proportional representation of any particular group on the jury or in the venire from which it is drawn. Only purposeful or intentional exclusion is barred. See *Taylor v. Louisiana*, 419 U.S. at 539; *Cassel v. Texas*, 339 U.S. 282, 289-90, 70 S.Ct. 629, 633 (1950); *Neal v. Delaware*, 103 U.S. 370, 394 (1880). Moreover, in light of our conclusion which follows, we do not determine whether the Statute as applied operated to exclude women and young people from the special jury below.

E.

The procedure for selecting special juries in Delaware has the potential for abuse and this Court cannot permit that potential from ever being realized. Neither the Statute nor the Superior Court Rule contain guidelines or criteria for the selection of special jury pools. An affidavit by the Superior Court Administrator, relied upon by plaintiffs, indicated, among other things, that there were no articulable guidelines used in special jury

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women who had volunteered or whose names had been submitted by the League of Women Voters. Cf. *Duren v. Missouri*, supra.

selection by Jury Commissioners, that the Commissioners "elected to use education and age as their criteria," and that they "selected persons with more than 12 years of formal education and intentionally avoided selecting persons either in their twenties or seventies." Consequently, there is no basis from which we can conclude that a constitutional violation has occurred.

In 1976 our Legislature undertook a broad reform of the "trial by jury" statute. Recognizing that "the American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross section of the community," *Thiel*, 328 U.S. at 220, the Delaware General Assembly enacted 10 *Del.C.* §§ 4501 and 4503, supra. Section 4501 embodies State policy "that all litigants in state courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the county wherein the court convenes." *Id.* Section 4503 prohibits the exclusion of a person from service as a grand or petit juror "on account of race, color, religion, sex, national origin or economic status." *Id.* The legislative revision left untouched the provisions of the Special Jury Statute, and we are satisfied that the Legislature intended to preserve the special jury practice when it did not repeal the statutory authority for it at the time that the reforms were made. We have already referred to the long history of the special jury practice in Delaware and, when properly selected, the practice has much to commend it. See *Luneburg v. Nordenberg*, supra; Note *The Case for Special Juries in Complex Civil Litigation*, 89 Yale L. J. 1155 (1980). However the present practice may not produce a jury pool that is representative of the community or consistent with the public policy announced in 10 *Del.C.* §§ 4501 and 4503.

Thus, we resort to our power under the Constitution to supervise the administration of justice in Delaware and to promulgate rules of procedure. Del. Const. art.

IV, § 13 (1897); *State v. Terry*, Del. Supr., 148 A.2d 102 (1959). Pursuant to that power and drawing upon the deference traditionally accorded to the states in the establishment of juror qualifications and selection procedures, see *Taylor v. Louisiana*, supra; *Carter v. Jury Comm'rs*, 396 U.S. 320, 90 S.Ct. 518 (1970); *Brown v. New Jersey*, supra; *Jugiro v. Brush*, 140 U.S. 291, 11 S.Ct. 770 (1891), we may authorize the revision of arbitrary or potentially discriminatory court procedures and practices to comport with constitutional principles. Exercising such power, we commend to the Superior Court the delicate and difficult task of drafting a Rule of Court stating criteria and guidelines for the selection of special juries to ensure "a cross section of the population suitable in character and intelligence for that civil duty." *Brown v. Allen*, 344 U.S. 443, 474, 73 S.Ct. 397, 416 (1953).

In drawing up criteria for the special jury selection process, the Superior Court should be mindful of the twin goals of achieving a fair representation of the community on the jury panel while providing for intelligent, educated and competent jurors for the adjudication of complex cases. See 10 *Del.C.* § 4503; *ABA Standards Relating to Trial by Jury* § 2.1 (approved draft 1968). We offer as a suggestion, and without fettering the Superior Court's discretion in this matter, that jurors be randomly selected from a special jury pool comprised of individuals meeting specified age, intelligence and educational requirements and, to the extent deemed legally permissible by the Superior Court, possessing special occupational skills. Perhaps a minimum educational requirement of a bachelor's degree from an accredited college or university might be one of those criteria.

In response to this Court's directive contained in our earlier Opinion in this matter, now superceded, the Superior Court has submitted a proposed plan and Rule for Selection of Special Juries which is now pending for

further study and approval of this Court. Until the proposed Rule or an alternative Rule is approved and the selection process is in place, the Superior Court shall not schedule any trial by special jury.

* * * *

AFFIRMED.

[OPINION OF THE DELAWARE SUPREME COURT
Dated March 15, 1982]

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. 114, 1981

LILLIAN M. HAAS, *et al.*,
Plaintiffs, Appellants,

v.

UNITED TECHNOLOGIES CORPORATION,
a Delaware corporation,
Defendant, Appellee.

Submitted: December 18, 1981

Decided: March 15, 1982

Before DUFFY, MCNEILLY, QUILLEN and HORSEY, Justices, constituting the Court *en Banc*

Upon appeal from Superior Court.

Affirmed in part, reversed and remanded.

Arthur Inden, Ben T. Castle (argued), Craig A. Karsnitz and Barry M. Willoughby, of Young, Conaway, Stargatt & Taylor, Wilmington; and Francis A. Ferrara of Kassab, Cherry, Curran & Archbold, Media, Pa., for plaintiffs-appellants.

Edmund N. Carpenter, II (argued), Allen M. Terrell and Helen L. Winslow, of Richards, Layton & Finger, Wilmington, for defendant-appellee.

DUFFY, Justice:

In this product liability case, plaintiffs appeal from a judgment of the Superior Court entered upon a verdict for defendant. We reverse the judgment in part and remand the case for a new trial.

I

Four United States servicemen were killed when a CH-53D, "Sea Stallion," helicopter crashed near Salisbury, Maryland, on January 8, 1975. The flight had originated at New River, North Carolina. Three of the dead were Marine Corps crewmen, and one was a member of the Air Force who was hitching a ride to McGuire Air Force Base in New Jersey.* This action was filed by the surviving spouses, children and personal representatives of the deceased men (plaintiffs against United Technologies Corporation (defendant), a Delaware corporation, which had manufactured the helicopter in its Sikorsky Division. On Sikorsky's motion and over plaintiffs' objection, a special jury was impaneled and, after it returned a verdict for defendant, plaintiffs docketed this appeal.

The parties agree that the crash occurred after one of six rotary wing blades fractured while the helicopter was in flight. The cause of the crash is the central issue in this litigation.

II

Two principal questions are submitted for our consideration in the appeal: (1) Did the Trial Judge, in his charge, improperly prohibit the jury from considering whether the helicopter was defective because the design thereof did not incorporate an inflight instrument ("cockpit BIM") which would have warned the pilot that a rotary blade was losing "pressure" and thus was subject to in-flight fracture; and (2) did use of the special jury violate 10 *Del.C.* §§ 4501 and 4503 and the Due Process and Equal Protection Clauses of the Federal and State Constitutions?

Other questions have also been argued and we will refer briefly to them in this opinion; but the cockpit

* A fifth serviceman, the co-pilot, also died in the crash but his death is not in issue in this litigation.

BIM and special jury issues are the main centers of controversy.

As to the cockpit BIM issue, the deaths occurred in Maryland and the parties agree that the law of that State governs. See Maryland Wrongful Death Statutes, Md.Code Ann.Cts. and Jud. Proc. § 3-901 *et seq.*

The procedural aspects of the litigation are governed by Delaware law and so we apply it in reviewing the contentions relating to use of a special jury.

III

The rotary wing blades on a Sea Stallion aircraft provide the lift necessary for flight. Each is a hollow aluminum spar or tube filled with pressurized nitrogen. If a crack occurs in a blade, nitrogen escapes and the resulting reduction in pressure inside the spar is measurable.

The helicopter which crashed was manufactured by Sikorsky in 1969 and sold to the Marine Corps in that year. Prior thereto, Sikorsky had developed a system for measuring changes in blade pressure which, if functioning properly, signaled a crack in a rotary blade. The procedure was a "Blade Inspection Method" and was generally known by its acronym: "BIM." It utilized a small gauge, about three inches in diameter, which was placed at the base of each of the rotary blades. Normally, when the blade was properly pressurized, each gauge was white but, if a loss of (nitrogen) pressure occurred, the gauge turned black. A white reading thus signaled that the pressure was within acceptable levels, a black gauge signaled trouble.

The gauges could be inspected only when the helicopter was on the ground *and* when the blades were not rotating. Pre-flight inspection of the aircraft thus included a check of all BIMs before the engines were started.

The Sea Stallion which crashed was equipped with Sikorsky's BIM system and much of the evidence at trial was directed to that system, its virtues and its defects, its reliability and its malfunctioning, the true and false warnings given by BIM gauges, nitrogen leakage from the (Schrader) valves on the gauges, and so on.

A.

Sikorsky contends that the crash resulted solely from the negligence of both the Marine air crew and the ground crew which had maintained the aircraft. Defendant relies on evidence showing that there had been four recent "black BIM" warnings on the blade which failed, that the maintenance manual called for replacement of a blade if "spar pressure" was lost, and on the testimony of a Marine Corps officer who said (in discussing Corps maintenance with respect to the crash) that we "just missed it."

Some maintenance problems were experienced with the BIM system which did not distinguish between a loss of pressure resulting from a defect in the system itself (such as a leaking valve) and a loss of pressure resulting from a cracking blade. In any event, we may assume for present purposes that maintenance by Marine Corps personnel was sometimes not reliable and that Corps maintenance personnel were negligent in not replacing the blade which cracked in flight on the Sea Stallion that crashed.

But negligence of Marine Corps personnel, even if assumed, is not determinative of the issue which plaintiffs have raised, namely, an alleged design defect that resulted from the failure of Sikorsky to install an on-board system for monitoring spar cracks during flight.

B.

As we have said, the BIM system was, by design, a check of blade pressure made on the ground before the

engines on the helicopter were started. After start-up, the check could not be made because the BIMs could be inspected only when the blades were at rest. And, of course, a BIM check could not be made when the helicopter was airborne. Plaintiffs focus on the latter limitation. They contend that Sikorsky's failure to include a continuous monitoring system for blade crack, that is, one which would inform a pilot while in flight of an incipient crack, was a design defect which should have been submitted to the jury for its consideration.

On that issue, plaintiffs submitted the following request for instructions to the jury:*

> "Even had the visual 'BIM' system worked properly, Plaintiffs allege, it was inadequate and unsafe as a warning device since there was no 'inside-the-cockpit BIM' indicator to warn the helicopter's crew in flight of a crack in the blade. Since there was no system for warning the crew in flight of an impending blade fracture, Plaintiffs contend that the Sikorsky-built helicopter was defective.
>
> If you find that the Sikorsky-built helicopter required a warning system for potential blade fractures in order for it to be operated safely, and if you find that the visual 'BIM' system was defective in this regard, either because it did not work as a warning system or because there was no 'inside-the-cockpit BIM', then you should find that the helicopter was defective."

The Trial Judge, however, charged the jury as follows:

> "In order to prevent the helicopter [which was defined to include the warning system and the flight and maintenance manuals] from being unreason-

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* We quote the request only to show that plaintiffs had requested a charge on cockpit BIM; we do not decide whether it is a complete statement of the Maryland law.

> ably dangerous, Sikorsky was required to design an adequate warning system and to give adequate directions as to its maintenance and use. Although a manufacturer is required to design a product that is not defective and unreasonably dangerous, this does not mean that it is required to include every possible safety device. Thus, if you find that the visual BIM system and applicable manuals were adequate, you may not find Sikorsky liable for failure to install an indicator in the cockpit."

After the jury was so instructed, plaintiffs excepted to the "language which makes Sikorsky liable for failure to install an indicator in the cockpit, contingent upon a finding that the visual BIM system was inadequate." And plaintiffs repeated that objection on this issue in a motion for a new trial.

The Trial Judge denied plaintiffs' motion for a new trial and his ruling indicates that he viewed his instruction as giving the jury the opportunity to independently consider whether an indicator in the cockpit was necessary in order to make the warning system safe. After quoting the instruction which he had given, the Court said this:

> "In order to prevail, the plaintiffs must prove that the helicopter was defectively designed. If the jury found that the warning system designed by Sikorsky, with the indicator on the rotor blade, was adequate, it could not find Sikorsky liable for failing to put an indicator in the cockpit. In other words, the plaintiffs could prevail on this contention only if the jury found that an indicator in the cockpit was necessary in order to make the warning system adequate."

But the jury was given a quite different test, that is, the jury was told that if the visual BIM system and the applicable manuals were found to be adequate, then,

"you may *not* find Sikorsky liable for failure to install an indicator in the cockpit." (Emphasis added.) In short, independent examinations of the systems were prohibited: the jury's right to consider the cockpit issue was made contingent on a finding of inadequacy of the "visual BIM system and applicable manuals." And, under the evidence in the case, that was reversible error.

The Court's instruction was erroneous because it failed to distinguish between a warning system for pre-flight or on-the-ground inspection and a system which warns of a defect while the aircraft is in flight. We certainly do not mean to suggest that an on-the-ground inspection system is inadequate as a matter of law if there is not an airborne supplement. But we do say that, under the circumstances of this case, the visual BIM system, which may have given an adequate warning of a defect while the helicopter was on the ground, was not necessarily an adequate system for all purposes. Clearly, while in flight the Sea Stallion was operating in an entirely different environment than it was while on the ground when the wheels carry the weight of the aircraft. But, in flight, as the maintenance manual states, the blades "provide the lift necessary for flight" and, implicitly, without such lift, flight cannot be sustained. The test for an adequate warning system for a blade defect under that circumstance may present the jury with a different question, if plaintiffs' evidence was sufficient to raise it.

We refer briefly to some of the evidence on whether in-flight instrumentation was necessary to provide an adequate warning system. But before doing so, we note that, although it appears that the helicopter was manufactured by Sikorsky to Government specifications, the Trial Judge instructed the jury as follows:

> "There has been evidence in this case that this helicopter was manufactured by defendant Sikorsky pursuant to government specifications. Since

Sikorsky participated in the preparation of these specifications and, in fact, exercised some discretion in the design and manufacture of this helicopter, particularly with regard to its main rotor blade assembly's visual BIM system, I instruct you that the existence of such specifications does not constitute a valid defense to plaintiffs' strict liability claim."

That ruling is not contested in this appeal.

C.

There was evidence at trial showing that Sikorsky had developed an in-flight warning system before the helicopter which crashed had been manufactured. There was evidence that the normal flight time of the Sea Stallion was designed to be two hours or less.* But there was also evidence from which the jury could have inferred that the design permitted and contemplated flights which lasted *longer* than two hours because fuel extension (wing) tanks were provided for and so was a "hot fueling" technique, that is, a ground refueling procedure accomplished while the rotor blades are operating (usually at a low speed);** in short, it means taking on

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* A two-hour inspection interval for inspection of the BIM gauges was deemed by Sikorsky to be adequate because propagation time from crack to fracture of a rotary blade was calculated to take longer than two hours. In other words, an engine shutdown after not more than two hours of operation, followed by a visual inspection of the BIMs, was deemed to provide an ample margin of safety for detecting any incipient crack in a blade.

** For example, the cross-examination of Mr. Dixon, one of the defendant's experts reads, in part, as follows:

"Q When it left Sikorsky, it could be hot refueled? You will agree with me, will you not, sir?

A Yes.

Q In fact, pressure refueling is listed in the specifications, is it not, sir?

A It is. Not for that purpose of hot refueling.

fuel without stopping the engines. In addition, there was evidence that an in-flight warning system should be provided if the helicopter was to be under power for more than two consecutive hours.

Q Well, does it say what the purpose for it is?

A No. But the purpose of it is, as I discussed with you before, such that you can refuel the aircraft faster, that you don't have fumes floating around the aircraft where you have electrical equipment running.

Q I understand that.

But in December of 1969, that aircraft could be hot refueled, and it was so designed in the specifications so that it could be hot refueled, whether it was intended or not intended for hot refueling?

A If you add that to it, yes.

Q You will agree with me there, sir?

A Yes.

* * *

Q . . .

Now, did the specifications, sir, say anything about extra fuel?

A It did not.

Q Are you certain of that?

A It has, I think, in there something possibly about provisions for connections or something like that. I don't recall what it does say, frankly.

Q Well, let's be sure, Mr. Dixon.

A Let me see the spec, then, please?

Q What paragraph have I just turned to, sir?

A 3.12.9.3.3.

Q And what does that say, sir?

A Says, 'Fuel tanks (range extension).'

Q I wonder if you would read that to the ladies and gentlemen of the jury, sir.

A 'Provisions shall be made for the installation of 300 gallon fiberglass fuel tanks for extended range use. The tanks, in accordance with specification MIL-T-6396 (ASG)-1, shall be part of the range extension kit which shall be included in Useful Load, when carried. The tanks, when used, shall be located in the cabin, secured in place with cargo tie-down fixtures, and connected to the engine fuel system vent line and pressure refueling line.'

Since evidence was elicited that indicated a hot fueling capability and wing tanks were included in the design of the aircraft, and since flights of more than two hours, or continuous engine operation for a period in excess of two hours were contemplated for the helicopter, it follows, in our opinion, that there was a jury issue as to whether the absence of a cockpit BIM was a design defect. *Restatement of Torts*, Second, § 402A. Compare *Schnell v. AMG, Inc.*, 3 Cir., 567 F.2d 1259, 1261 (1977); *Foster v. Ford Motor Co.*, 5 Cir., 616 F.2d 1304, 1309-1311 (1980); *Roy v. Star Chopper Co., Inc.*, D. R.I., 442 F.Supp. 1010, 1020 (1977); aff'd, 584 F.2d 1124, *cert. denied*, 440 U.S. 916, 99 S.Ct. 1124; *Dorsey v. Yoder Company*, E.D. Pa., 331 F.Supp. 753, 760 (1971); *Bexiga v. Havir Manufacturing Corp.*, N.J.Supr., 290 A.2d 281, 285 (1972); *Azzarello v. Black Bros. Co., Inc.*, Pa.Supr., 391 A.2d 1020, 1027 (1978).

D.

Sikorsky argues that a cockpit BIM was unreliably dangerous because a "false" warning of an emergency might lead a pilot to attempt a landing in an unsafe

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Q Does that refresh your recollection, sir?

A Yes, it does. That's why I mentioned before that the fuel tanks are not in the aircraft but says there are provisions for it.

Q Well, Dr. Cunitz was here and said that he saw them in the aircraft.

A He may very well have. They are not used all the time; but they're used occasionally.

Q So, there were provisions for range extension for these aircraft made in the documents and the specifications, were there not, sir?

A To be used for ferry purposes, only.

Q Does that say 'to be used for ferry purposes only?

A No. But if you look up the change that incorporates the fuel tank, they're used for ferrying purposes only. I suspect it's also in the flight manual.

Q Mr. Dixon, didn't the helicopter that crashed in this case have a range extension tank in it?

A It had one in it, but I don't know if it was used or not."

place. And so it might. But the merits of a cockpit BIM (that is, whether its disadvantages were greater than its virtues) presented an issue to be determined by the jury.

Sikorsky also contends that, when it discovered that CH-53Ds were being used on flights lasting longer than two hours, it repeatedly recommended to the Navy that cockpit BIMs be installed, and those recommendations were rejected. Had such a recommendation been accepted and had the helicopter which fell been so equipped ("retrofitted"), the crash might have been prevented. But that, too, presents a matter for the jury's consideration. Specifically, Sikorsky is charged with a design defect at the time of manufacture and its efforts with respect to retrofitting took place thereafter. While such evidence may have a place in the fact-finding process, it is not determinative nor a conclusive defense in this appeal.

Sikorsky argues that it was entitled to a directed verdict on the liability issue* but, since we conclude that plaintiffs are entitled to have the absence of an airborne warning system placed before the jury on the design-defect issue, it follows that Sikorsky is not entitled to a directed verdict.

Sikorsky also argues that it was entitled to a directed verdict on certain other issues which the Trial Court had retained in the case for consideration by the jury. Specifically, Sikorsky says that it was entitled to judgment on all counts relating to defects in the visual BIM system and defective manuals, but the evidence as to both issues is in conflict and the Trial Judge's ruling was proper.

As to the alleged contributory negligence of the air crewmen, it is undisputed that on the morning of the

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* The Trial Judge directed a verdict for defendant as to certain issues and that ruling is not contested in this appeal.

final flight, all BIMs on the Sea Stallion were white before the engine was started, and any failure to make a further check before takeoff was a fact for the jury to consider. A charge of such contributory negligence, of course, cannot be asserted against the Airman who was riding only as a passenger.

IV

While the parties agree that Maryland law governs, they differ as to the consequence thereof when applied to this case in which the product was delivered by Sikorsky, pursuant to contract, to the Marine Corps for military purposes. The Trial Judge charged the jury on strict liability and negligence.

In *Phipps v. General Motors Corporation*, Md.Ct.App., 363 A.2d 955 (1976), Maryland's highest court adopted the rationale of the *Restatement* (Second) of Torts, § 402A and concluded that an allegation of a defective condition, which rendered an automobile not reasonably safe for its intended use, stated a cause of action under Maryland law.

Sikorsky argues that § 402A is applicable only to goods intended for "consumption" by the general public and that Maryland would not apply it to the manufacture of a military product. Specifically, Sikorsky says that Maryland would follow a New Jersey ruling in *Sanner v. Ford Motor Company*, N.J.Super., 364 A.2d 43 (1976), aff'd, N.J.Super.Ct.App.Div. 381 A.2d 805 (1977); *cert. denied*, N.J.Supr., 384 A.2d 846 (1978). That case involved a failure to install seat belts (or a roll bar) in a military jeep but there, clearly, as the Appellate Division said, "seat belts would be incompatible with the intended use of the vehicle." 381 A.2d at 806. No such showing has been made in this case in which blade safety was certainly not incompatible with military use of the aircraft.

Sikorsky also argues that, under Maryland law, strict liability in tort is not applicable to a military contractor. While the issue is not free from doubt, given Sikorsky's participation in the design of the helicopter and the emphasis in *Phipps* on the "unreasonably dangerous" aspect of the rule, we are not persuaded that Maryland would accord any less protection to personnel in the military service than that given to civilian users of the product. *Foster v. Day & Zimmerman, Inc.*, 8 Cir., 502 F.2d 867, 874-875 (1977); *O'Keefe v. Boeing Company*, S.D.N.Y., 335 F.Supp. 1104 (1971). See also *North American Aviation, Inc. v. Hughes*, 9 Cir., 247 F.2d 517 (1957), *cert. denied*, 255 U.S. 914; *Boeing Airplane Company v. Brown*, 9 Cir., 291 F.2d 310 (1961); *Gladstone v. Grumman Aircraft Engineering Corp.*, N.Y. Supr.App.Div., 5 N.Y.S.2d 252 (1938); *Montgomery v. Goodyear Tire & Rubber Company*, (S.D. N.Y.), 231 F.Supp. 447 (1964) (applying admiralty law), aff'd, 2 Cir., 392 F.2d 777 (1968), *cert. denied*, 393 U.S. 841.

* * * *

Sikorsky argues that it was entitled to a directed verdict with respect to the claim made on behalf of Ginger Schlectic, a daughter of one of the Marines. Plaintiffs failed to respond to that argument and, given the evidentiary record called to our attention, we agree that it is insufficient to support the claim. In short, the motion should have been granted.

V.

We now consider the second question, which concerns the validity of the application of the Delaware Special Jury Statute to the facts in this case, 10 *Del.C.* § 4541. That Statute reads as follows:

> "(a) A special jury for the trial of a cause, shall be ordered by the Court upon the application of either party.

(b) The party applying for the special jury under this section shall give due notice to the opposite party, and to the Prothonotary, of the time and place of striking such jury. At such time and place the Prothonotary, or his deputy, or if the Prothonotary is not indifferent between the parties, then 2 proper persons indifferent between the parties, appointed by the Superior Court, shall attend with a list of 48 indifferent and judicious citizens of the county, qualified to serve as jurors, showing their names and places of abode.

(c) The party applying for the special jury under this section, his agent or attorney, shall first strike out one of the names, and then the opposite party, his agent or attorney, shall strike out another; and so on, until each shall have struck out 12. If the opposite party, or any person on his behalf, shall not attend, or shall refuse to strike, the Prothonotary or his deputy, or the persons appointed to strike the jury, as the case may be, shall strike for the party not attending, or refusing to strike.

(d) After each party shall have struck 12 names under this section, the remaining 24 persons on the list shall be the jury to be returned for the cause. The Prothonotary, or his deputy, or the persons appointed to strike the jury, as the case may be, shall thereupon deliver to the sheriff a certified list of the names of such persons, with their places of abode, as the jurors to be summoned for the cause, annexed to a venire facias commanding him to summon them. The sheriff shall, thereupon, summon the persons named, according to the command of the writ, and shall return the list with the venire."

The procedure for impaneling a special jury is stated at 10 *Del.C.* § 4542, which reads:

> "At the trial of the cause, a special jury shall be drawn from the list, returned under § 4541 of this title, in the manner provided in this chapter for other cases. In the selection of a special jury, if any of the 24 persons remaining on the list as provided in § 4541 of this title, are unable to sit as jurors, for any reason satisfactory to the Court, the Court may in its discretion limit the challenges by each party to not less than 3. If the panel is reduced, however, to less than 18, the Court shall dismiss the jury, unless the party requesting the special jury waives sufficient of his challenges to permit a jury to be selected. The costs of the special jury so dismissed in such case shall be borne by the party requesting the special jury."

The procedure for requesting a special jury is also governed by Superior Court Rule 40(b) which provides:

> "Application for a special jury shall be made at or before the marking of the case for trial. A party who has applied for a special jury may withdraw such application and have the case tried by the general jury, provided that the granting of such withdrawal will not unduly prejudice or inconvenience an opposing party."

A.

In *Nance v. Rees*, Del.Supr., 161 A.2d 795 (1960), this Court reviewed the history of special juries both in this State and in England before 1776 and concluded that the practice violated neither the Due Process Clause of the Federal Constitution nor the right to trial by jury provision of the Delaware Constitution, *Art. I § 4*. We draw liberally from that opinion in reviewing the history of special juries in considering plaintiffs' request that we overrule the constitutional decision in *Nance*.

A "special" jury* is not an American invention. The special jury was well known in English common law and one scholar has traced it back to the 14th Century.** Thayer, *The Jury and Its Development*, 5 *Harv. L. Rev.* 295 (1889). Similarly, the special jury concept is firmly rooted in the history of Delaware law and practice. For example: "struck" juries are noted in several of Delaware's oldest reported cases decided shortly after the American Revolution; see *Burton's Lessee v. Prettyman*, Del.Supr., 1 Del. Cas. 11 (1793); *Newbold's Lessee v. Stokley*, Del.Supr., 1 Del. Cas. 10 (1793); and *Polk's Lessee v. Ross*, Del. Com. Pl., 1 Del. Cas. 40 (1794).* The procedure for selecting a special jury has also been discussed by Delaware Courts in more recent times. See *Robelen Piano Co. v. DiFonzo*, Del.Super., 172 A.2d 568 (1961); *Sharpe v. Thompson*, Del.Super., 147 A.2d 649 (1958); and *O'Mallie v. Harlan & Hollingsworth*, Del. Super., 99 A. 428 (1916).** In sum, the special jury as an institution is firmly established in Delaware law and practice and its constitutionality has been upheld. *Nance v. Rees*, supra.

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* A special jury is also commonly referred to as "Blue ribbon" or "struck" jury. See 47 *Am. Jur. 2d* Jury §§ 153, 154; Luneburg & Nordenberg, Specially Qualified Juries and Expert Non Jury Tribunals: Alternatives for Coping With the Complexities of Modern Civil Litigation. 67 *Va. L. Rev.* 887 (1981).

** Special juries are also discussed by Blackstone. See III *Blackstone's Commentaries* § 357 (Sharswood Ed.)

* In addition to early Delaware decisional law, the practice is discussed in Rule 17 of the Supreme Court promulgated in 1790 (1 Del. Cas. XL) and in 4 *Del. Laws* c. CXX, p. 322 (1810) (entitled, An Act for Regulating the Trial of Causes by Special Juries). It should be noted that under the Delaware Constitutions of 1776 and 1792, the Supreme Court was a Court of original jurisdiction, similar to the present Superior Court.

** For a discussion of past Delaware procedure with respect to requesting a special jury, see 1 *Wooley, On Delaware Practice*, § 561, pp. 402, 403 (1906).

B.

In this case, plaintiffs contend that the Special Jury Statute, as applied, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment in that it fails to provide objective criteria for selection of the pool from which the special jury was drawn, and that the Prothonotary arbitrarily excluded certain identifiable groups (especially women and young people) from the pool; thus, say plaintiffs, the list did not represent a fair cross section of the community. Second, plaintiffs argue that the Statute (and the ruling in *Nance v. Rees*, supra) must be reexamined in light of the enactment of 10 *Del.C.* ch. 45 which, in essence, provides that litigants in Delaware Courts are entitled to grand and petit juries selected at random so that a jury will represent a fair cross section of the county in which the court convenes.

Sikorsky argues that the constitutionality of special juries has been upheld by the Supreme Court of the United States and by this Court; that the amendment to the Delaware Code is applicable only to petit and grand juries and not to special juries, and that the Special Jury Statute and the procedure were fair to all parties.

C.

We first consider the constitutional issue.

During the last Century, the United States Supreme Court has considered many challenges to Federal and state grand and petit jury selection practices. Generally, such challenges were based upon allegations that the selection practices purposefully and intentionally excluded a certain group of qualified jurors and, consequently, the jury panel did not represent a fair cross section of the community. Those challenges have been brought under: the Sixth Amendment (right to a speedy and public trial in criminal actions before an impartial

jury), see e.g. *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664 (1979), and *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692 (1975); the Fifth Amendment (right to indictment by a grand jury in Federal felony actions, see e.g., *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163 (1972); *Castenada v. Partida*, 430 U.S. 482, 97 S.Ct. 1272 (1977) (Powell, dissenting opinion); and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, see e.g., *Alexander v. Louisiana*, 405 U.S. 625; 92 S.Ct. 1221 (1972), and *Aikens v. Texas*, 325 U.S. 398, 65 S.Ct. 1276 (1945).

While the decisions were grounded upon different constitutional bases, the Supreme Court has made certain broad observations concerning the American jury system. Thus, the Court,

> "[h]as unambiguously decided that the American concept of jury trial contemplates a jury drawn from a fair cross section of the community. A unanimous Court stated in *Smith v. Texas* . . . '[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.'"

Taylor v. Louisiana, 95 S.Ct. at 696. And the Court has also stated that,

> "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings necessarily contemplates an impartial jury drawn from a cross section of the community."

Thiel v. Southern Pacific R.R., 328 U.S. 217, 66 S.Ct. 984, 985 (1946). And,

> "[o]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government."

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 472 (1942).

The absence of any cognizable or identifiable group from the jury or jury pool, however, does not offend the Constitution unless it is the result of systematic exclusion of that group, *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628 (1972) (J. White, plurality opinion); *Thiel*, supra, 66 S.Ct. at 985, or purposeful discrimination. *City of Mobile v. Boulden*, —— U.S. ——, 100 S.Ct. 1490, 1505 n.24 (1980); *Akins v. Texas*, 325 U.S. 398, 65 S.Ct. 1276 (1945).

In addition to challenges to petit and grand jury selection practices, the Court on several occasions has examined state special jury statutes to determine constitutionality and, on each occasion, has upheld constitutionality in a criminal context. See *Moore v. New York*, 333 U.S. 565, 68 S.Ct. 705 (1948); *Fay v. New York*, 332 U.S. 261, 67 S.Ct. 1613 (1947), and *Brown v. New Jersey*, 175 U.S. 172, 20 S.Ct. 77 (1899).

D.

It is not clear that the standards applied in the cited cases are particularly helpful in the resolution of this case because, with one exception, each case involved a challenge to jury selection procedures by a criminal defendant.* The one Supreme Court case dealing specifically with a challenge to a civil jury was decided, not

* It should be noted that the Supreme Court has heard and decided two class action civil suits brought by persons who alleged that state jury selection procedures unconstitutionally excluded them from grand and petit jury service and from service on the County Board of Education (because the Board was selected by the grand jury). *Carter v. Jury Comm'rs of Green Co.*, 396 U.S. 320, 90 S. Ct. 518 (1970); *Turner v. Fouc...*, 396 U.S. 346, 90 S. Ct. 532 (1970). Although not specifically an attack on the selection of a civil jury, arguably that was an attack on the procedure for selecting civil and criminal juries. In *Carter*, the Court found a constitutional right that the source of the jury selection list reasonably reflect "a cross section of the population suitable in character and intelligence for that civil duty." 90 *S. Ct.* at 525.

on constitutional grounds, but upon the supervisory power of the Court over the administration of justice in the Federal System. *Thiel v. Southern Pacific R.R.*, supra. Moreover, cases based upon the Fifth and Seventh Amendments do not apply here because those Amendments have not been held applicable to the States under the Fourteenth Amendment (and the Fifth Amendment right to a Grand Jury is clearly not applicable in a civil case). See *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163 (1972) (J. Marshall plurality); *McLancon v. McKeithen*, 345 F.Supp. 1025, E.D. La. (1972), aff'd sub nom *Davis v. Edwards*, 409 U.S. 1098, 93 S.Ct. 908 (1973). Furthermore, it is not clear that the same Due Process and Equal Protection standards applicable to jury selection in a criminal trial would be applicable in a civil trial. *Luneberg v. Nordenberg*, supra at 922-926.* And the most recent Supreme Court case upholding a state special jury selection procedure in a criminal context is more than thirty years old, and its validity today, in light of recent cases, is questionable.**

E.

Even assuming, for the sake of argument, that these standards are applicable in this context, we doubt that plaintiffs have met their burden of proving what they argue, that is, the intentional, purposeful and systematic exclusion of women, and other identifiable groups, from

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* The Supreme Court has stated that the reasons for trial by jury in a criminal context and in a civil context are different. For example, in *Colgrove v. Battin*, 413 U.S. 149, 93 S. Ct. 2448 (1973), the Court stated that the purpose of trial by jury in a criminal case is to prevent oppression by the government, and in a criminal *and civil* case to assure fair and equitable resolution of factual issues.

** For example: In *Fay v. New York*, supra, the Court did not find a constitutional problem with selecting only those women who had volunteered or whose names had been submitted by the League of Women Voters. Cf. *Duren v. Missouri*, supra.

the special jury pool. They rely only on statistical computations which show that the population of New Castle County was approximately 53% female, that the jury pool was only 33.9% female, that the jury in this case was 16% female, and that the youngest member of this special jury panel was 37. Such figures may be suspect but that does not necessarily prove intentional and systematic exclusion. It is well settled that a criminal defendant does not have a constitutional right to proportional representation of any particular group on the jury list or on the jury which tries him; he has only a right not to have any group purposefully or systematically excluded. See *Taylor v. Louisiana*, supra, 95 S.Ct. at 702; *Cassel v. Texas*, 339 U.S. 282, 70 S.Ct. 629 (1950). In light of the conclusion which follows, however, we need not determine whether such exclusion occurred.

F.

Whether or not systematic exclusion of women (or any other particular group) occurred in this case, the potential for unfair and discriminatory jury selection practices is present in the present special jury system and it should not be permitted to continue. Neither the Statute nor the Rule states guidelines or criteria to be followed in obtaining the master list or pool of special jurors and, here, indeed, the Prothonotary was unable to articulate the juror qualifications or criteria which were used by his office to assemble the special jury master list before October 1980. Consequently, there is no way to determine whether the selection process used was nondiscriminatory and provided a pool that reflected a fair cross section of the community.

As a starting point for the selection of special juries in Delaware, we recognize that the American tradition of trial by jury "contemplates an impartial jury drawn from a cross section of the community." *Thiel*, supra, 66 *S.Ct.* at 985. That policy was adopted by Delaware

when the General Assembly enacted 10 *Del.C.* § 4501 which states that, "[i]t is the policy of the State that all litigants in state courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the county wherein the court convenes." Furthermore, 10 *Del.C.* § 4503 prohibits the exclusion of a person from service as a grand or petit juror "on account of race, color, religion, sex, national origin or economic status."

We are satisfied that the Legislature clearly intended to preserve the special jury practice when it did not repeal the statutory authority for it at the time when a broad reform of the "trial by jury" Statute was undertaken in 1976. We have already referred to the long history of the special jury practice in Delaware and, when properly selected, the practice has much to commend it.* See Note: *The Case for Special Juries in Complex Civil Litigation*, 89 Yale L. Rev. 1155 (1980); *Luneburg v. Nordenberg*, supra.

Historically, the Supreme Court has shown a great deal of deference to the states in the establishment of juror qualifications and selection procedures. *Carter v. Jury Commr's*, supra; *Brown v. New Jersey*, 175 U.S. 172, 20 S.Ct. 77 (1899); *Jugiro v. Brush*, 140 U.S. 291, 11 S.Ct. 770 (1891). For example, the Court has stated,

> "Our holding does not augur or authorize the fashioning of detailed jury selection codes by federal courts. The fair cross-section principle must have much leeway in application. The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it

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* The special jury practice has not escaped criticism. See *Nance v. Rees*, supra, 161 *A.2d* at 801; *Robelen v. DiFonzo*, 172 *A.2d* at 571. See also the vigorous dissents in *Fay v. New York*, supra, and *Murphy v. New York*, supra.

> may be fairly said that the jury lists or panels are representative of the community."

Taylor v. Louisiana, 95 S.Ct. at 701.

We are, then, at this point: The special jury practice has long been followed in Delaware, the General Assembly has never repealed the Statute authorizing it (in spite of judicial criticism), under proper management the practice may be useful in the administration of justice, and there are, as presently construed, no constitutional provisions which prevent it. But the present practice may not produce a jury pool which is representative of the community and/or which is consistent with the public policy announced in 10 *Del.C.* § 4501.

This Court has the power to supervise the administration of justice in Delaware and to promulgate rules of procedure. *State v. Terry*, Del.Supr., 148 A.2d 102 (1959); *Del.Const.*, Art. IV, § 13. Pursuant to that power, we may require that arbitrary or potentially discriminatory court procedures and practices be changed. Exercising such power, we direct the Superior Court to undertake the delicate and difficult task of drafting a Rule of Court stating criteria and guidelines for the selection of special juries.

In setting forth the qualifications and standards for juror qualification selection procedures, the Superior Court should carefully consider the competing policy goals, i.e., to provide intelligent, educated and competent jurors for the adjudication of difficult and complex cases, yet insuring, as far as possible, that the jury represents a fair cross selection of the community and does not discriminate on the basis of race, color, religion, sex, national origin, or economic status. See 10 *Del.C.* § 4503; *ABA Standards Relating to Trial by Jury* § 2.1 (approved draft 1968). Without limiting the discretion of the Superior Court, we suggest that the Rule provide for the random selection of jurors and for selections from

the random pool based on specified criteria including, but not limited to, age, intelligence and education, and to the extent deemed to be legally permissible, on occupation and/or special skills. For example, compare *Carter v. Jury Comm'rs of Green Co.*, supra, wherein the Court stated:

> "The states remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character."

90 *S.Ct.* at 525.

The Superior Court is directed to submit a proposed Rule to this Court within sixty days from the date of this Opinion. Until the Rule is approved and the selection process is in place, the Court shall not schedule any trial by special jury.

* * * *

Affirmed in part, reversed and remanded for proceedings consistent herewith.

THE SUPREME COURT
OF THE STATE OF DELAWARE

MANDATE

TO THE HONORABLE THE JUDGES OF The Superior Court of the State of Delaware in and for New Castle County:

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

1441 C. A. 1976

LILLIAN M. HAAS, *et al.*,

v.

UNITED TECHNOLOGIES CORPORATION, *et al.*

a certain judgment or order was entered on the 6th day of April 1981, to which reference is hereby made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on August 25 1982, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed.

WITNESS the Honorable D. L. Herrmann, our Chief Justice, at Dover, the First day of January, A.D. 19—

Issued September 27, 1982
Supreme Court No. 114, 1981

/s/ T. Edgar Townsend, Jr.
Clerk of the Supreme Court.

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. 114, 1981

LILLIAN M. HAAS, *et al.*,
Plaintiffs Below, Appellants,

v.

UNITED TECHNOLOGIES CORPORATION,
a Delaware Corporation,
Defendant Below, Appellee.

Submitted: September 9, 1982

Decided: September 27, 1982

Before MCNEILLY, QUILLEN, HORSEY, and MOORE,
Justices, constituting the Court en banc

ORDER

This 27th day of September 1982,

Upon Motion of Plaintiffs Below, Appellants for re-argument pursuant to Supreme Court Rule 18 of the Court's Opinion dated August 25, 1982, the Motion be and is hereby DENIED.

BY THE COURT:

/s/ John J. McNeilly
Justice

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. 114, 1981

LILLIAN M. HAAS, Personal Representative of the Estate of and parent and next of kin of John V. Cataldi, deceased; CHERYL RUFF, personal representative of the Estate of and widow of and next of kin of Edwin J. Ruff, Jr., deceased; BETTY LOU SCHLECTIC BAHE, as guardian and next friend of Ginger Schlectic, minor child of Ralph C. Schlectic, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS, personal representative of the Estate of and widow of and next of kin of Mark Lamascus, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS as guardian and next friend of Sarah Laine Lamascus and Mark David Lamascus, minor children of Mark Lamascus, deceased,

Plaintiffs-Below, Appellants,

v.

UNITED TECHNOLOGIES CORPORATION,
a Delaware corporation,
Defendant-Below, Appellee.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

TO: Mr. T. Edgar Townsend, Jr. Clerk
Supreme Court of Delaware
Supreme Court Building
Dover, Delaware 19901

Edmund N. Carpenter, II, Esquire
Allen M. Terrell, Jr., Esquire
Helen L. Winslow, Esquire
Richards, Layton & Finger
One Rodney Square
P. O. Box 551
Wilmington, Delaware 19899

Notice is hereby given that Lillian M. Haas, Cheryl Ruff, Betty Lou Schlectic Bahe, and Julia Kathleen McDonald Lamascus, in their individual and representative capacities as above stated, Appellants herein. Plaintiffs Below, hereby appeal to the Supreme Court of the United States of America from the final judgment of the Supreme Court of the State of Delaware entered in this action on September 27, 1982 affirming the judgment of the Superior Court of the State of Delaware in Civil Action No. 1441, 1976 denying Plaintiffs-Below, Appellants' motion for a new trial by a decision dated March 17, 1981 and order dated April 6, 1981; and from the verdict and judgment of the special jury on January 20, 1981; and from the decision dated November 26, 1980 denying Plaintiffs-Below, Appellants' motion to prevent impaneling of special jury.

This appeal is taken pursuant to 28 *U.S.C.* § 1257(2).

/s/ Arthur Inden
ARTHUR INDEN

/s/ Ben T. Castle
BEN T. CASTLE

/s/ Barry M. Willoughby
BARRY M. WILLOUGHBY
Young, Conaway, Stargatt & Taylor
1401 Market Tower
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Wilmington, Delaware 19899
Attorneys for Plaintiffs-Below, Appellants

FRANCIS A. FERRARA, ESQ.
Kassab, Cherry, Curran & Archold
Media, Pennsylvania 19063
Of Counsel

Dated: December 15, 1982

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. 114, 1981

LILLIAN M. HAAS, Personal Representative of the Estate of and parent and next of kin of John V. Cataldi, deceased; CHERYL RUFF, personal representative of the Estate of and widow of and next of kin of Edwin J. Ruff, Jr., deceased; BETTY LOU SCHLECTIC BAHE, as guardian and next friend of Ginger Schlectic, minor child of Ralph C. Schlectic, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS, personal representative of the Estate of and widow of and next of kin of Mark Lamascus, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS as guardian and next friend of Sarah Laine Lamascus and Mark David Lamascus, minor children of Mark Lamascus, deceased,

Plaintiffs-Below, Appellants,

v.

UNITED TECHNOLOGIES CORPORATION,
a Delaware corporation,
Defendant-Below, Appellee.

PROOF OF SERVICE

AND NOW, this 15th day of December, 1982, I hereby certify that all parties required to be served have been served copies of the foregoing Notice of Appeal and that service was made on Appellee pursuant to United States Supreme Court Rule 28.3, 28 *U.S.C.A.* by mailing three copies via United States mail, with first-class postage prepaid, to Appellee's counsel of record: Edmund N. Carpenter, II, Esquire, Richards, Layton & Finger, One

Rodney Square, P. O. Box 551, Wilmington, Delaware 19899.

/s/ Ben T. Castle
BEN T. CASTLE
Young, Conaway, Stargatt & Taylor
1401 Market Tower, P. O. Box 391
Wilmington, Delaware 19899
Attorneys for Plaintiffs-Below, Appellants

STATE OF DELAWARE)
) ss:
COUNTY OF KENT)

I, T. EDGAR TOWNSEND, JR., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing are true and correct copies of the judgment (mandate) entered by the Supreme Court of the State of Delaware on September 27, 1982 and the Notice of Appeal to the United States Supreme Court filed on December 15, 1982 in *Haas, et al. v. United Technologies*, No. 114, 1981 as the same remains on file and of record in this Court.

IN WITNESS WHEREOF, I have set my hand and affixed the Seal of the Supreme Court of the State of Delaware at Dover, Delaware this 15th day of December, 1982.

/s/ T. Edgar Townsend, Jr.
T. EDGAR TOWNSEND, JR.
Clerk
Supreme Court of Delaware

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. 114, 1981

LILLIAN M. HAAS, *et al.*,
Plaintiffs Below, Appellants,

v.

UNITED TECHOLOGIES CORPORATION,
a Delaware Corporation,
Defendant Below, Appellees.

MOTION OF PLAINTIFFS BELOW, APPELLANTS FOR REARGUMENT, PURSUANT TO SUPREME COURT RULE 18 OF THE COURT'S OPINION DATED AUGUST 25, 1982

Plaintiffs Below, Appellants (hereafter "Plaintiffs"), by and through their undersigned counsel, respectfully request the Court to grant reargument on its Opinion dated August 25, 1982, which supersedes the Court's previous *en banc* Opinion dated March 15, 1982. In support of this motion Plaintiffs represent as follows.

I. PRELIMINARY

(a) The Court's Opinion of August 25, 1982, indicates on its cover page and in the first footnote that there was a cross-appeal filed by United Technologies Corporation, Defendant Below, Appellee (hereafter "Defendant"), and that this cross-appeal was from the denial of its motion for a directed verdict with respect to certain issues. Although the Defendant argued, and in fact devoted 40 pages of its answering brief to the point that it was error for the Trial Court to deny its motion for a directed verdict, no cross-appeal was ever taken.

(b) The Court's Opinion of August 25, 1982 discusses only the Cockpit BIM issue and the special jury issue.

However, there were four other arguments advanced on behalf of Plaintiffs, any one of which if credited would require reversal of the judgment below. These arguments were made at Pages 58 through 60 of Plaintiffs' Opening Brief and were rejected in the Court's Opinion of March 15, 1982 but are nowhere mentioned in the Opinion of August 25, 1982.

(c) More importantly, the Court's Opinion of August 25, 1982 creates the anomalous situation of accepting the essential validity of the Plaintiffs' two principal arguments, i.e. the Cockpit BIM argument and the special jury argument by two *en banc* opinions (a total of five different justices), and yet unjustly fails to reverse the judgment below and order a new trial. The anomaly is even more curious, at least in the context of the Cockpit BIM issue, when the Court has decided in its most recent Opinion that the jury (albeit a special jury) was not confused by the Trial Court's erroneous instruction on this point, yet three justices of this Court apparently experienced sufficient uncertainty to reverse themselves after study of the issues presented over a period of ten months, extensive briefing, and three oral arguments.

If, as this Court's August 25, 1982 Opinion indicates, the instruction was not so misleading as to deprive the jury of its ability to "intelligently perform its duty in returning a verdict", *Newman v. Swetland*, Del. Supr., 338 A.2d 560, 562 (1975); *Storey v. Camper*, Del. Supr., 314 A.2d 187, 199 (1973); *Wyatt v. Clendaniel*, Del. Supr., 320 A.2d 738 (1977), why then did four justices of this Court unanimously agree in this Court's March 15, 1982 decision that the Cockpit BIM instruction was erroneous and constituted reversible error? Yet, after additional deliberation and further oral argument before a differently constituted court that the Court reversed itself, finding that although the Cockpit BIM instruction was "imprecise," the Plaintiffs were not thereby entitled to a new trial.

This result is unfair and anomalous, particularly in view of this Court's failure to even mention its prior holding and rationale on the Cockpit BIM issue [i.e., "The [Trial] Court's instruction was erroneous because it failed to distinguish between a warning system for pre-flight or on-the-ground inspection and a system which warns of a defect while the aircraft is in flight". Opinion of March 15, 1982 at pages 7-8], nor to explain how it is that three justices of the current panel could at first agree that the instruction was clear error, then reverse themselves, and still conclude that the jurors with a few hours' deliberation somehow clearly understood and correctly applied the instruction.

(d) This Court specifically finds in its August 25, 1982 Opinion, as it did in its March 15, 1982 Opinion, that the special jury procedure as applied in this case was arbitrary, with representation of women and young people "suspect," and was so irrational that this Court has prohibited the impanelling of future special juries until new and fair selection procedures are developed. Yet, at the same time the Court denies these Plaintiffs a new trial even though their case was actually heard under this (at a minimum) arbitrary and "potentially discriminatory" system. The Court failed to consider that, constitutional arguments aside, its supervisory power provides ample authority for relief here.* And, the August 25, 1982 Opinion likewise fails to address Plaintiffs' statutory argument that 10 *Del. C.* §§ 4501-4503 applies to "all litigants" including cases involving special juries and that the Jury Commissioners' admitted failure to comply with the statute is, in and of itself, ground for reversal. Finally, it is, at best, unusual to rule that all future plaintiffs will be protected from the arbitrary and potentially discriminatory system while those who suffered from it and came to this Court for relief will be turned away without a remedy.

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* *See* Argument III, A, *infra* at pages 11-12.

II. THE COCKPIT BIM ISSUE

A.

Throughout the case Plaintiffs took the position that the visual BIM warning system and the Cockpit BIM, that is, in-flight, warning system were separate and distinct warning systems. They gave different warnings to different personnel at different times, the in-flight warning of course being the far more crucial and effective warning. This was clearly and concisely recognized by the Court's first Opinion of March 15, 1982. The Defendant itself treated the Cockpit BIM warning as separate and distinct from the visual BIM in the litigation (see, for instance, Defendant's request for instruction on Cockpit BIM which appears at Page A-80 of Plaintiffs' Appendix). And Sikorsky treated the system as separate in its internal technical documents (A-139-140). Despite these facts, counsel for Defendant in the course of oral argument on June 21, 1982, in response to a direct inquiry from the Bench, asserted without any equivocation that the Cockpit BIM and the visual BIM were part and parcel of the same warning system. This argument coincided with the *sua sponte* instruction that was given by the Trial Court lumping the two warning systems together and thus prohibiting independent consideration of the in-flight system. Because this point is so crucial it bears repeating. The Trial Court mentioned Cockpit BIM in only two places in the following objected-to language:

> "The Plaintiffs contend that the visual BIM warning system was inadequate because it did not incorporate any warning in the cockpit
>
> * * * *
>
> if you find that the visual BIM system and applicable manuals were adequate, you may not find Sikorsky liable for failure to install an indicator in the cockpit."

Jury instructions are designed to provide ordinary laymen with a clear and accurate statement of the law they are expected to apply in reaching a verdict. *McPhee v. Reichel*, 461 F.2d 947 (3d Cir., 1972). There is only one, erroneous, meaning that can be attached to the above-quoted language, i.e., the jury was prohibited from even considering the Cockpit BIM issue unless it first found the visual BIM inadequate.

In inexplicably sharp contrast to the Opinion of March 15, 1981, this Court's Opinion of August 25, 1982 perpetuates the Trial Court's error by stating:

> "As is evident from the instruction, the Trial Court also reminded the jury of plaintiffs' contention on the cockpit BIM question. In light of the instructions taken as a whole, it would not be fair or reasonable to focus in on one passage of the charge and stretch it into a basis for reversal * * * In our view the instructions did not prohibit the jurors from reaching the cockpit issue unless, as plaintiffs believe, they first ascertained that the visual BIM by itself was inadequate." (Page 15)

Undeniably, this particular language flatly contradicts the instruction that the jury in fact was given. It also stands in stark contrast to the Opinion written by Justice Duffy on March 15, 1982 in which he repeatedly distinguished between an on-the-ground inspection system and an in-flight warning system and declared the obvious:

> "The [Trial] Court's instruction was erroneous because it failed to distinguish between a warning system for pre-flight or on-the-ground inspection and a system which warns of a defect while the aircraft is in flight. We certainly do not mean to suggest that an on-the-ground inspection system is inadequate as a matter of law if there is not an airborne supplement. But we do say that, under the circum-

> stances of this case, the visual BIM system, which may have given an adequate warning of a defect while the helicopter was on the ground, was not necessarily an adequate system for all purposes. Clearly, while in flight the Sea Stallion was operating in an entirely different environment than it was while on the ground when the wheels carry the weight of the aircraft. But, in flight, as the maintenance manual states, the blades 'provide the lift necessary for flight' and, implicitly, without such lift, flight cannot be sustained. The test for an adequate warning system for a blade defect under that circumstance may present the jury with a different question, if plaintiffs' evidence was sufficient to raise it." (Pages 7-8 of Opinion dated March 15, 1982)

As Justice Duffy in effect held, a party is entitled to have his theories of the case presented to the jury by proper instruction if there is evidence to support them. *Blassingill v. Waterman S. S. Corp.*, 336 F.2d 367 (9th Cir., 1954). To now say that the special jury refused to follow the Trial Court's erroneous instruction and in fact did consider the Cockpit BIM issue as a separate issue, not only constitutes unlawyerlike speculation on what the jury did, but also makes a mockery of the special jury's, or any jury's, ability to follow the Trial Court's instructions. Indeed, the special jury here even had a written copy of the instructions in hand during the course of their deliberations.

This Court's Opinion of August 25, 1982 proceeds to override the erroneous Trial Court instruction, saying:

> "* * * we stand convinced that the instructions did not mislead nor withdraw that issue from the jury. Any impreciseness in the one line of the jury charge complained of was cured by the instructions viewed as a whole and is not the basis for a reversal here." (Page 16)

What the Court now labels euphemistically as one "imprecise" line of the jury charge *was one of only two lines in the entire charge that referred to Cockpit BIM.* And both those lines were misleading and erroneous, even based on the Defendant's own requests for instructions to the jury. Thus, much more than mere "impreciseness" is involved. Instead, a critical theory of Plaintiffs' case was excised by the Trial Court's wrong, *sua sponte* instruction.

B.

This Court refers to the portion of the Trial Judge's instruction to which we make vigorous objection as being a one-sentence "culprit". *The tenor of this remark and the rest of the opinion seems to suggest that the Trial Court's instruction was inadvertently erroneous.* This is simply not the case. The Trial Court throughout treated the Cockpit BIM warning system and the visual BIM system as a single system. The Trial Judge never was able to treat the two systems as separate and distinct systems; consequently, his instruction to the jury treated them as a single system with the resulting charge that the jury could not possibly find Sikorsky liable on a Cockpit BIM theory. For instance, in the course of one of the prayer conferences Judge Balick said the following:

> "I will instruct on the contention on Cockpit BIM, but my plan is to do that in connection with the contention on the effectiveness of the visual BIM system. I don't understand the Dorsey case to support the proposition for which it was argued, which I understand to be that even if the jury finds that visual BIM system was not defective, it can find the defendant liable because it did not design a Cockpit BIM system." (B-313)

This Court's opinion of August 25, 1982 has perpetuated this fundamental error which stripped the Plaintiffs

of one of their basic contentions. Apart from the instruction that was submitted by the Defendant treating the visual BIM and the Cockpit BIM systems as separate and distinct, and in contrast to what was said to this Court in the course of oral argument, Sikorsky's own documents which are contained in the appellate record illustrate the separate nature of these two warning systems. For instance, in a letter describing an engineering change proposal (ECP) the assistant secretary of Sikorsky Aircraft wrote on August 2, 1968:

> "* * * this ECP recommends the incorporation of a Cockpit BIM warning system in all HH-53B/T helicopters. The proposed system would provide an in-flight indication of main rotor blade spar integrity, which under long-range flight operations will provide enhanced mission reliability, offer an increased confidence level by the air crew and allow corrective action should the 'blade pressure' light become illuminated." (A-139)

And again in a memo dated November 11, 1974, prior to the accident in this case, a Sikorsky representative, corresponding with no less than 16 other Sikorsky engineering and technical personnel, refers to the "incorporation of Cockpit BIM," states that it would provide information

> "that pilots have not had before. In the past, BIM information was available only on the ground before or after a flight,"

and further says, "With the advent of Cockpit BIM, however, pilots now know that blade pressure has been lost while they are in the midst of a mission." (A-140) And even more graphically, in the chart that one of the Sikorsky officers used to explain the advantages of Cockpit BIM to a gathering of commercial helicopter rep-

resentatives, the Sikorsky document, obviously carefully prepared, described the following:

> "VISUAL BIM—NO IN FLIGHT MONITORING" "COCKPIT BIM—CONTINUOUS IN FLIGHT MONITORING" (A-320)

The decision by this Court to endorse the error that was committed by the Trial Court may, we recognize, eventually stand as the final word in this litigation. However, if that were to occur it would stand the facts of this case on their head because the record shows that the Defendant clearly considered these critical warnings to be separate and distinct.* To now uphold the Trial Court's *sua sponte* instruction would be to exalt judicial error** regardless of the cost to the victims of the crash. It would also be out of step with this Court's recent decision in *Hochberg v. Keiser*, Del. Supr., 447 A.2d 425 (1982), in which a jury verdict for the defendant in an auto collision case was reversed because of an instruction (which appears to be comparably innocuous) that was "general in nature":

> "In short, asuming contributory negligence should be charged at all, this is a case which cannot be fairly given to the jury on an instruction on contributory

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* Although it nowhere appears in the Court's latest decision, each of the prior *visual* BIM warnings was heeded and responded to by Marine Corps maintenance personnel. That, in hindsight, it appears the maintenance personnel, following the Sikorsky-prescribed troubleshooting procedure, failed to catch the real cause of the blade pressure loss is no reason to conclude that the helicopter was A-1 in terms of providing warnings of blade pressure loss, especially when the aircraft was in flight.

** This Court has frequently held that even if otherwise correct, a trial court opinion may be reversed if the court fails to state the grounds for its decision. *Husband M. v. Wife D.*, Del. Supr., 399 A.2d 847 (1979). Yet, in the case at bar the Court has found the Trial Court's instruction, at least, "imprecise" and the jury panel drawn by an "arbitrary and potentially discriminatory" process and not granted Plaintiffs relief.

negligence which is general in nature and not related to the facts of this case. *Beck v. Haley*, Del. Spur., 239 A.2d 699, 702 (1968)" 447 A.2d at 427

C.

This Court's Opinion further indicates that "it is difficult for this Court to believe that the jury did not consider the Cockpit BIM issue". While that may or may not be true, it is sheer sophistry to suggest that they could have considered it other than as directed by the Trial Court. For this Court to assume (contrary to the verdict) that the special jury deliberately overrode or ignored the Court's instruction on this key point is to say that this special jury violated its oath to faithfully apply the facts to the law as given it by the Trial Court. Before this, it has always been well-established that this Court, from its appellate vantage point, will not speculate on a jury's deliberations, but, instead, will presume that the jury acted as instructed by the Trial Court. *See, e.g., Yaskowski v. Wallis*, Del. Supr., 205 A.2d 825, 827 (1964) wherein this Court stated: "Since there is no way of knowing what effect the [erroneous] instruction had upon the amount of the verdict, a new trial must be granted. . . ." *Beggs v. Wilson*, Del. Supr., 272 A.2d 713, 715 (1970); *Newman v. Swetland*, Del. Supr., 338 A.2d 560, 561-62 (1975).

In addition, we must respectfully point out that counsel were advised prior to summation about the details of the Trial Court's charge and were specifically enjoined from arguing that the helicopter was defective for failure to incorporate as a separate warning system the in-flight or Cockpit BIM warning. For this Court, in effect to say that the special jury ignored and refused to follow the Trial Court's instruction on a key point in the case and to further hold that the instructions were overridden (by the jury) as a result of testimony that was introduced in the course of the trial but which could not be

argued consistent with Plaintiffs' theory of the case, constitutes rather explicit judicial cynicism about the function of a jury. It is ironic, indeed, that the Delaware Supreme Court takes that tack in the same Opinion that extols the virtues of special juries.

III. THE SPECIAL JURY ISSUE

A.

While the Court's Opinion of August 25, 1982 closely parallels the discussion of special juries which appeared in the Opinion of March 15, 1982, it declines to state whether or not the frailties and inadequacies of the special jury system as put into practice in this State constitute a ground for reversal in this case. Nevertheless, the Court goes to considerable lengths to criticize the special jury procedure as applied heretofore and specifically to direct the Superior Court not to schedule any trials by special jury until an acceptable method of selection is put into place. Given that the Plaintiffs in this case had their very substantial interests adversely affected by a special jury selected in what can only be described as a wholly arbitrary and shabby process, it is difficult to articulate why these Plaintiffs should be saddled with the result of a poorly selected, male-dominated, defense-oriented special jury, but no other plaintiffs will have to suffer that same injustice.

First, even putting aside arguments as to the constitutionality, either on its face or as applied, of the special jury system, this Court's supervisory power provides ample authority to reverse and remand this case for a new trial. Thus, in *Thiel v. Southern Pacific Railroad*,* 328 U.S. 217, the U.S. Supreme Court held that:

> "* * * we cannot sanction the method by which the jury panel was formed in this case. The trial court

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* *Thiel, supra*, is a *civil action* for damages for wrongful death of the plaintiff's decedent.

should have granted petitioner's motion to strike the panel. That conclusion required us to reverse the judgment below in the exercise of our power of supervision over the administration of justice in the Federal courts. *See McNabb v. United States*, 318 U.S. 332, 340, 87 L.Ed. 819, 823, 63 S.Ct. 608." **

Moreover, to grant Plaintiffs' relief this Court need not consider what effect the improperly drawn panel had on the case since it is:

> "* * * unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class. *See Glasser v. United States*, 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457, *supra; Walter v. County Bd.*, 171 Minn. 177, 213 N.W. 545, 52 ALR 916. It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class. The evil lies in the admitted wholesale exclusions of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen." *Thiel, supra* at 225.

Second, the record amply demonstrates intentional and purposeful discrimination. This Court at Page 25 of its Opinion states:

> "* * * we conclude that plaintiffs have not made out a case for unconstitutional exclusion of identifiable groups from the special jury. The figures submitted by plaintiffs may be suspect but do not show intentional and systematic exclusion."

** On two occasions prior to the impanelling of the jury in this case, Plaintiffs moved to prohibit impanelling of the special jury.

How then, does this Court account for this uncontradicted statement by the Superior Court Administrator:

> "10. The Jury Commissioners elected to use education and age as their criteria. They selected persons with more than 12 years of formal education and *intentionally* avoided selecting persons either in their twenties or seventies." (Emphasis added) (A-174; A-175)

This intentional exclusion was inaugurated by the Jury Commissioners in October of 1980, and was in effect at the time the special jury in this case was selected for the trial to commence in December of 1980. There is no blinking the fact that there was intentional exclusion of an identifiable group of persons, that this intentional exclusion bore absolutely no relationship to the ability of a person to decide so-called technical or complex issues (and this was even a subject of specific inquiry from the Bench in the course of oral argument on December 18, 1981, with the defense arguing that it was no different than setting age requirements for U.S. Senators and Presidents). Such a system at a minimum smacks of unfairness, especially in a situation in which all of the decedents and their survivors are young. It bears repeating that the youngest juror who sat on this case was 37 years old.

B.

This Court's action in declaring that special juries shall not be implemented until new rules are drafted by the Superior Court in order to prevent the "potential for abuse" from the arbitrary system applied in this case, yet simultaneously denying these Plaintiffs a new trial, is an unusual "purely" prospective application of a judicial decision. At common law, all decisions were given retroactive application. *Linkletter v. Walker*, 381 U.S. 618, 622, 14 L.Ed. 601, 604 (1967) (and authorities therein). The U.S. Supreme Court has declared,

however, that in extraordinary circumstances decisions may be given either a limited retroactive effect or applied only prospectively. *Linkletter, supra; see also Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199 (1967).

In determining whether the Court will apply a rule retroactively, give it a limited retroactive effect, prospectively, or purely prospectively (i.e., not including the case before it), the U.S. Supreme Court has held that it "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation". *Linkletter, supra* at 14 L.Ed. 608. *See also* Annotation Supreme Court Decision —Retroactivity, 22 L.Ed 821, 832-839.

In the present case it is respectfully submitted that a purely prospective application is inappropriate. First, the purpose of this Court's Opinion in directing the lower court to draft guidelines for the special jury is to prevent an "arbitrary or potentially discriminatory" procedure, to make the special jury practice comport with constitutional principles, and to insure a fair cross-section of the community. Here, it is undeniable that these Plaintiffs' case was tried by a jury panel drawn through an arbitrary process and that they, more than anyone else, suffered from the system used. Thus, at the least, this case should be included in the relief given by the Court since the purpose of the new rules announced is to prevent the very injustices suffered by these Plaintiffs from being repeated. Since it is these Plaintiffs who were the parties to bring the improper special jury procedure to the Court's attention and whose case was actually heard by the improper system, it stands to reason that the purpose of this Court's decision can only be fulfilled by including them in the relief.

Moreover, the effect on the administration of justice in applying the new rules to the current case would be minimal. Since this is a civil matter and there are no

other pending special jury actions, only this case will be affected and the courts will not thereby be required to re-examine numerous other judgments or pending cases (as may be the case in the criminal field). Accordingly, we respectfully submit that this Court's purely prospective application of its ruling in this case is not appropriate. Indeed, we submit, to apply this decision in a purely prospective fashion is unfair to the point of constituting a denial of Plaintiffs' rights to due process and equal protection of the laws guaranteed by the U.S. Constitution, Amendment XIV. If, as this Court has on two occasions declared, the jury panel here were the product of an arbitrary and potentially discriminatory process which required the exercise of this Court's supervisory powers, then surely, like *Thiel, supra*, these Plaintiffs should be included in the remedy.

C.

This Court's August 25, 1982 Opinion further fails to address or resolve Plaintiffs' contention that the special jury drawn here violates 10 *Del. C.* §§ 4501-4503 which provides "that *all* litigants in State Courts entitled to trial by jury *shall* have the right to grand and petit juries selected at random from a fair cross-section of the county wherein the Court convenes". While the Court's Opinion points out that the statute embodies the strong public policy of requiring jurors to represent a fair cross-section of our State and admits that "the present [special jury] practice may not produce a jury pool that is representative of the community or consistent with the public policy announced in 10 *Del. C.* §§ 4501 and 4503", the Court does not say whether the Jury Commissioners admitted failure to follow the mandate of the statutes is grounds for reversal.

As pointed out in our opening brief at pages 38-41 and our reply brief at pages 18-20, we respectfully submit that in enacting 10 *Del. C.* §§ 4501-4503 the General As-

sembly either impliedly repealed the special jury statute or, at the very least, intended that the special jury statute be subject to the same requirements for fair representation as other juries. Indeed, 10 *Del. C.* §§ 4501 states in sweeping terms that "*all* litigants . . . *shall* have the right to grand and petit juries selected *at random* from a fair cross-section of the country". As pointed out in our reply brief at page 19 this Court has said that "all" plainly means "all" unless special exceptions are made. *Robert C. S. v. Barbara J. S.*, Del. Supr., No. 211, 1980 (August 18, 1980). And, this Court's Opinion explicitly states that the Court is "satisfied that the legislature intended to preserve the special jury practice when it did not repeal the statutory authority for it at the time that the reforms [of 10 *Del. C.* §§ 4501-4503] were made". It follows that the legislature must also have had the special jury statute in mind in 10 *Del. C.* § 4501 when it chose the words "all litigants". Thus, because 10 *Del. C.* § 4501 is mandatory (i.e., litigants *shall* have the right) and the statute plainly includes "all litigants", including these Plaintiffs, reversal is required in view of the Jury Commissioners' admitted failure to comply with the fair cross-section requirements of the statute. Accordingly, regardless of the constitutional issues,* Plaintiffs are entitled to a new trial on statutory grounds, based upon the admitted statutory violation of 10 *Del. C.* §§ 4501-4503.

D.

We submit that simple concepts of equity and fairness require that a new trial be granted to these Plaintiffs where this Court has declared, on two occasions, that the special jury panel selected here was by an arbitrary and

* Since 10 *Del. C.* §§ 4501-4503 speaks in sweeping terms, it was plainly intended to provide more protection than the minimal constitutional protection afforded by requirements of due process or equal protection. Indeed, to hold otherwise would be to reduce the statute to a nullity since it would thereby be redundant to the previously existing constitutional requirements.

potentially discriminatory process, from a pool of jurors which, at the very least, we may "suspect" had been the product of intentional and purposeful discrimination, and which this Court has emphatically declared cannot continue in the future.

This Court's proclamation that it "cannot permit that potential [of abuse and discrimination] from ever being realized" has, we suggest with candid deference, a hollow ring when it sits idly by and allows these Plaintiffs who suffered from that abuse and who came to it for relief to go without remedy while those who follow shall (may) not.

* * * *

We can only remind this Court that as the highest court in this State, it is charged with the duty of leading the bench and bar to the fair, practical, and equitable administration of the judicial process. Surely, to deny these Plaintiffs a retrial before a fairly selected jury under appropriate instructions when the Court itself has declared that the system which tried their case was "arbitrary and potentially discriminatory" and the jury instructions, at least, "imprecise," fosters, regrettably, a discouraging and cynical view of the judicial process.

Respectfully submitted,

/s/ Arthur Inden
ARTHUR INDEN

/s/ Ben T. Castle
BEN T. CASTLE

/s/ Craig A. Karsnitz
CRAIG A. KARSNITZ

/s/ Barry M. Willoughby
BARRY M. WILLOUGHBY
Young, Conaway, Stargatt & Taylor
1401 Market Tower
P.O. Box 391
Wilmington, Delaware 19899
Attorneys for Plaintiffs Below,
Appellants

Dated: September 9, 1982

SUPREME COURT OF DELAWARE

MEMORANDUM

From: Justice McNeilly

To:

Re: Lillian M. Haas, Et al.

v.

United Technologies Corporation, Et al.
No. 114, 1981

Please substitute the amended pages 25 and 26 in the Opinion of this Court in captioned matter dated August 25, 1982.

/s/ Justice McNeilly

Haas, Et al. v. United Technologies Corporation, Et al., No. 114, 1981 Opinion decided August 25, 1982—Revised pages 25 and 26 Sept. 24, 1982

To support their contention of intentional, purposeful, arbitrary and systematic exclusion of women and young people from the jury pool, plaintiffs rely on statistics which show that the population of New Castle County was 53% female, that the jury pool was only 33.9% female, that the jury panel in this case was only 16% female, and that the youngest member of this struck jury was 37. Assuming, for the sake of argument, that the standards discussed above are applicable to this civil special jury case, we conclude that plaintiffs have not made out a case for unconstitutional exclusion of identifiable groups from the special jury. The figures submitted by plaintiffs may be suspect but do not show intentional and systematic exclusion. And as we stressed earlier, a criminal defendant is not constitutionally entitled to proportional representation of any particular group on the jury or in the venire from which it is drawn. Only purposeful or intentional exclusion is barred. See *Taylor v. Louisiana*, 419 U.S. at 539; *Cassel v. Texas*, 339 U.S. 282, 289-90, 70 S.Ct. 629, 633 (1950); *Neal v. Delaware*, 103 U.S. 370, 394 (1880). Hence, we hold that plaintiffs have not established that the special jury statute, as applied in this case, was in violation of their constitutional rights.

E.

Nevertheless the procedure for selecting special juries in Delaware has the potential for abuse and this Court cannot permit that potential from ever being realized. Neither the Statute nor the Superior Court Rule contain guidelines or criteria for the selection of special jury pools. An affidavit by the Superior Court Administrator, relied upon by plaintiffs, indicated, among other things, that there were no articulable guidelines used in special jury selection by Jury Commissioners, that the Commis-

sioners "elected to use education and age as their criteria," and that they "selected persons with more than 12 years of formal education and intentionally avoided selecting persons either in their twenties or seventies."

In 1976 our Legislature undertook a broad reform of the "trial by jury" statute. Recognizing that "the American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross section of the community," *Thiel*, 328 U.S. at 220, the Delaware General Assembly enacted 10 *Del.C.* §§ 4501 and 4503, supra. Section 4501 embodies State policy "that all litigants in state courts entitled to trial by jury shall have the right to grand petit juries selected at random from a fair cross section of the county wherein the court convenes." *Id.* Section 4503 prohibits the exclusion of a person from service as a grand or petit juror "on account of race, color, religion, sex, national origin or economic status." *Id.* The legislative revision left untouched the provisions of the Special Jury Statute, and we are satisfied that the Legislature intended to preserve the special jury practice when it did not repeal the statutory authority for it at the time * * *

* * * *

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE REHEARING OR REARGUMENT IN CERTAIN CASES

ORDER

This 11th day of March, 1982,

It Appearing to the Court that:

(1) The cases listed in paragraph (a) hereof have been submitted for decision;

(2) Justice Duffy is a member of the Court *en banc* or the panel to which each case has been submitted and he will retire from the Court, effective March 31, 1982; and

(3) In order to assure completion of adjudication of each case before Justice Duffy's retirement becomes effective, it is necessary to shorten the time in which a motion for reargument or rehearing may be filed under Rule 18, or Rule 4(f),

NOW, THEREFORE, IT IS ORDERED That:

(a) The time periods provided in Rule 4(f) for filing of a motion for rehearing *en banc* and in Rule 18 for filing a motion for reargument are suspended, and such periods are hereby reduced to *seven* (7) days after filing of the Court's opinion or order, in each of the following cases:

Case No.	Caption
3, 1981	Patricia M. d. v. Alexis I. d.
75, 1980	Roane v. Williams
337, 1979	Waters v. State
107, 1981	B. v. B.
219, 1980	Harrison v. State
119, 1981	Whaley v. McClure
161, 1980	Norton v. Poplos
114, 1981	Haas v. United Tech.
285, 1980	Allstate v. Spinelli
77, 1981	Gregory J.M. v. Carolyn A.M.
238, 1981	Bosch v. Papendick
270, 1981	Newton v. Nationwide
221, 1981	Darley Liquor v. Smith

All other provisions of the said Rules remain applicable to the cases.

(b) A copy of this Order shall be docketed in each case listed in paragraph (a) and shall be delivered to counsel with a copy of the opinion or order determining the matter under submission.

BY THE COURT:

/s/ Daniel L. Herrman
Chief Justice

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. 114, 1981

LILLIAN M. HAAS, *et al.*,
Plaintiffs Below, Appellants,

vs.

UNITED TECHNOLOGIES CORPORATION, *et al.*,
Defendants Below, Appellees.

ORDER

This 29th day of October, 1981,

IT IS ORDERED pursuant to Rule 4(d) of this Court:

(1) That the case be and it is hereby scheduled for rehearing and determination by the Court en Banc, without further briefing and upon a priority basis; and

(2) That the case be scheduled for rehearing by the Court en Banc during the December 1981 Session of the Court.

/s/ Daniel L. Herrman
Chief Justice

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

No. 114, 1981

LILLIAN M. HAAS, Personal Representative of the Estate of and parent and next of kin of John V. Cataldi, deceased; CHERYL RUFF, personal representative of the Estate of and widow of and next of kin of Edwin J. Ruff, Jr., deceased; BETTY LOU SCHLECTIC BAHE, as guardian and next friend of Ginger Schlectic, minor child of Ralph C. Schlectic, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS, personal representative of the Estate of and widow of and next of kin of Mark Lamascus, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS as guardian and next friend of Sarah Laine Lamascus and Mark David Lamascus, minor children of Mark Lamascus, deceased,

Plaintiffs-Below, Appellants,

v.

UNITED TECHNOLOGIES CORPORATION, a Delaware corporation, UNITED AIRCRAFT CORPORATION, a Delaware corporation, UNITED AIRCRAFT CORPORATION OF NEW YORK CITY, a Delaware corporation, and THE SIKORSKY DIVISION OF UNITED TECHNOLOGIES CORPORATION,

Defendants-Below, Appellees.

NOTICE OF APPEAL

TO: Edmund N. Carpenter, II, Esq.
Allen M. Terrell, Jr., Esq.
Helen L. Winslow, Esq.
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899

PLEASE TAKE NOTICE that Lillian M. Haas, Cheryl Ruff, Betty Lou Schlectic Bahe, and Julia Kathleen Mc-

Donald Lamascus, Plaintiffs-Below, Appellants, do hereby appeal to the Supreme Court of the State of Delaware from the decision of The Hon. Bernard Balick of the Superior Court of the State of Delaware, in and for New Castle County, denying plaintiffs' motion for a new trial in Civil Action No. 1441, 1976, which decision was dated March 17, 1981, along with the Order entered thereon by The Hon. Bernard Balick on April 6, 1981, and from the verdict and judgment rendered by the jury on January 20, 1981, in Civil Action No. 1441, 1976, and from the decision and Order rendered by The Hon. Bernard Balick of the Superior Court of the State of Delaware dated November 26, 1980, denying Appellants' Motion to Prevent Impaneling of Special Jury at Request of Defendants And To Order Trial By Ordinary Jury, rendered in the proceedings in Civil Action No. 1441, 1976, in the Superior Court.

The names of the attorneys below for Appellees are Edmund N. Carpenter, II, Esq., Allen M. Terrell, Jr., Esq., and Helen L. Winslow, Esq., at the address listed above.

DIRECTIONS TO COURT REPORTER OF PROCEEDINGS BELOW TO BE TRANSCRIBED PURSUANT TO RULE 9(e)

TO: Prothonotary
Public Building
Wilmington, Delaware 19801

Appellants do hereby direct the proceedings in *Lillian M. Haas, et al.* v. *United Technologies Corporation, et al.*, Civil Action No. 1441, 1976, in the Superior Court of the State of Delaware, In and For New Castle County, to be transcribed as set forth below:

(a) The appropriate docket entries in the above-captioned cause, including the Court's Order of November 26, 1980, the Court's decision of March 17, 1981, and the Order thereon dated April 6, 1981.

(b) The complete transcript of the trial before The Hon. Bernard Balick beginning December 1, 1980, and continuing through January 20, 1981. Trial transcripts for this case were prepared on a daily basis and are on file. No further transcripts are necessary at this time.

(c) The complete transcript of the office conference before The Hon. Bernard Balick on November 26, 1980, on Appellants' foregoing Motion to Prevent Impaneling of Special Jury.

We hereby certify that transcription of the above-listed portions of the proceedings below is essential to the prosecution of this Appeal.

/s/ Arthur Inden
ARTHUR INDEN

/s/ Ben T. Castle
Young, Conaway,
Stargatt & Taylor
1401 Market Tower
P.O. Box 391
Wilmington, Delaware 19899
Attorneys for Plaintiffs
Below, Appellants, Lillian
M. Haas, Cheryl Ruff,
Betty Lou Schlectic Bahe
and Julia Kathleen
McDonald Lamascus

Of Counsel:

FRANCIS A. FERRARA, Esq.
Kassab, Cherry, Curran
and Archbold
214 North Jackson St.
Media, Pennsylvaia 19063

The undersigned, attorneys of record for the Appellees above named, hereby signify their acknowledgement of service of the foregoing Notice of Appeal, in duplicate, this 15th day of April, 1981.

EDMUND N. CARPENTER, II

ALLEN M. TERRELL, JR.

HELEN L. WINSLOW

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action ———

LILLIAN M. HAAS, *et al.*,

v. *Plaintiffs,*

UNITED TECHNOLOGIES CORPORATION, *et al.*,
Defendants.

BILL OF COSTS PURSUANT TO § 5107

TO: Prothonotary
Superior Court
Public Building
Wilmington, DE 19801

Pursuant to 10 *Del. C.* § 5107, please enter the Bill of Costs herein by defendant to be taxed to the plaintiffs, as listed below and itemized on the attached schedule. These costs are in addition to the costs itemized in the Bill of Costs filed by defendants on February 6, 1981.

1. The fees for duplicating and velobinding defendants' briefs on appeal.
2. Filing fees incurred by defendants on appeal.
3. Special exhibit costs.

/s/ Helen L. Winslow
E. N. CARPENTER, II
ALLEN M. TERRELL, JR.
HELEN L. WINSLOW
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, DE 19899
Attorneys for Defendants

cc: Arthur Inden, Esquire
Young, Conaway, Stargatt & Taylor
1401 Market Tower
Wilmington, DE 19801
Attorneys for Plaintiffs

Dated: October 5, 1982

SCHEDULE OF COSTS

Duplicating and Velobinding	$2,951.90
Filing Fees	$ 11.25
Special Exhibit	315.10
TOTAL:	$3,278.25

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1441, 1976

LILLIAN M. HAAS, *et al.*,
Plaintiffs,

v.

UNITED TECHNOLOGIES CORPORATION, *et al.*,
Defendants.

MOTION TO TREAT THE EXPENSES OF THE SPECIAL JURY AS PART OF THE COSTS IN THE CASE

Defendant hereby moves that this Honorable Court certify pursuant to 10 *Del. C.* § 4543 that the above-captioned cause was proper to be tried by a special jury and that the expenses occasioned by the trial of the cause by such special jury shall be treated as part of the costs in the case, to be taxed against the losing party. The grounds for this motion are as follows:

Upon motion the Court in its discretion may order payment of the costs and expenses of the special jury, including the costs of striking and summoning and other expenses occasioned by trial of the cause by special jury, to be treated as part of the costs in the case. The Court naturally must wait until after the case has been tried and the Court has had an opportunity to hear the evidence, to determine whether or not the cause was properly tried by special jury, and the expenses of the special jury treated as costs. *Nance v. Rees*, Del. Supr., 161 A.2d 795 (1960).

Because of the length of the trial and the volume of the evidence, the jury in this case has had a heavier burden than is normal in most cases. The case was complex,

not only because of the number of legal issues and extraordinary number of contentions and defenses raised throughout the trial, but also because it was a case involving technology and a variety of expertise.

Trial began on December 1, and the jury retired to consider its verdict on January 19. Even the plaintiffs' counsel in their predictions of the trial's length, did not think the trial would last so long. In deliberating, the jury was confronted by a couple hundred documents in evidence, many of which are long and technical. The jury had to consider the testimony of a large number of witnesses who testified either in person or by depositions.

In his opening (Vol. A, p. 19) and in his closing to the jury (Vol. Y, p. 35), Mr. Inden conceded that this was a case appropriate for a special jury. A critical witness for the plaintiffs, Tannian, treated this as an "exceptional case". Defendant agrees and also believes that only a "special jury" can properly deal with the volume of evidence and complexity of the issues necessarily raised in such an unusual case.

For the foregoing reasons, defendant urges the Court to grant this motion.

Respectfully submitted,

E. N. CARPENTER, II
ALLEN M. TERRELL, JR.
HELEN L. WINSLOW
Richards, Layton & Finger
P.O. Box 551
Wilmington, DE 19899
Attorneys for Defendant

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1441, 1976

LILLIAN M. HAAS, *et al.*,
Plaintiffs,
v.
UNITED TECHNOLOGIES CORPORATION, *et al.*,
Defendants.

BILL OF COSTS PURSUANT TO § 5112

TO: PROTHONOTARY
Superior Court
Public Building
Wilmington, DE 19801

Pursuant to 10 *Del. C.* § 5112, please enter the Bill of Costs herein by defendants to be taxed to the plaintiffs pursuant to 10 *Del. C.* § 5101 and Civil Rule 54 of the Superior Court, as listed below and itemized on the attached schedules:

1. The fees of the Court Reporters for daily transcripts, as itemized in attached Schedule A. Because of the length, complexity and nature of this case, caused in part by the large number of issues raised by plaintiffs, it was necessary and appropriate to have daily transcripts. In rulings on evidence and motions, such as whether or not plaintiffs had conceded that corrosion pitting was not a part of the case or that there was no contention that the blade was defective for use of aluminum as a material, it is submitted that daily transcripts were of use to the Court. In arguments on evidentiary matters and on motions, the plaintiffs made use of the daily transcript by referring the Court to specific portions of the transcript. Indeed, the daily transcript was made available to the plaintiffs during trial. Applying a virtually identical procedural rule, the federal courts have often treated

trial transcripts as costs in a case to be recovered by the prevailing party. *See, e.g., Perlman v. Feldman*, 116 F. Supp. 102 (D. Conn. 1953); and *Manley v. Canterbury Corp.*, 17 F.R.D. 234 (D. Del. 1955).

2. The fees for duplicating, printing and preparing trial exhibits, including blow-ups and transparencies, as itemized in attached Schedule B. Because of the complexity of the case, the hundreds of documents introduced principally by plaintiffs, and the direction of the jury's attention to specific portions of exhibits, memoranda and manuals, it was necessary and appropriate to have blow-ups and transparencies, as well as copies of the exhibits themselves. A number of federal courts have allowed such expenses to be treated as costs recoverable by the prevailing party. *Wahl v. Carrier Manufacturing Co.*, 511 F.2d 209 (7th Cir. 1975); *Freedman v. Philadelphia Terminal Auction Co.*, 198 F. Supp. 429 (E.D. Pa. 1961); *Prashker v. Beech Aircraft Corp.*, 24 F.R.D. 305 (D. Del. 1959); *Department of Highways v. McWilliams Dredging Co.*, 10 F.R.D. 107 (W.D. La.), *aff'd.* 187 F.2d 61 (5th Cir. 1951), and *Bennett v. Kiggins*, D.C. App., 391 A.2d 236 (1978), *cert. denied*, 439 U.S. 1072 (1979).

3. The fees for defendants' expert witness, Dr. Arthur McEvily, as itemized in attached Schedule C. The actual fees paid to an expert witness by the prevailing party, including travel to and from the courthouse and time spent testifying, are part of the costs. 10 *Del. C.* § 8906; *Stevenson v. Henning*, Del. Supr., 268 A.2d 872 (1970); and *Claus v. Babiarz*, Del. Ch., 190 A.2d 19 (1963). The Delaware state rule has been followed in the federal district court. *Chemical Bank v. Kimmel*, 68 F.R.D. 679 (D. Del. 1975).

4. Costs for trial witnesses' travel and hotel expenses as itemized in attached Schedule D. All the witnesses listed on Schedule D, other than Stanko, were called to testify by plaintiffs, although Dixon was also called by defendants. Had plaintiffs attempted to subpoena such witnesses, travel and room expenses might have been re-

quired and certainly such expenses were necessarily incurred as a result of plaintiffs' conduct of this litigation. See, generally, *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964).

5. The costs incurred in connection with depositions introduced or referred to during trial, as listed in attached Schedule E. The fees paid to court reporters for the Court's copy of transcripts of depositions introduced into evidence are taxabale costs. Civil Rule 54(f). The depositions that were actually introduced into evidence have been designated by an asterisk on Schedule E. Throughout the trial, from time to time, plaintiffs referred to deposition testimony of others, such as Baldwin or Zincone, and accordingly, defendant seeks recovery of the costs in connection with all depositions. *Perlman v. Feldman, supra*; *Prashker v. Beech Aircraft, supra*; *Manley v. Canterbury Corp., supra*; and 20 C.J.S. *Costs* § 194 (1940).

6. The costs of the special jury as listed in Schedule F, and in accordance with defendant's motion to tax the costs of the special jury in this case against plaintiffs.

/s/ Allen M. Terrell, Jr.
E. N. CARPENTER, II
ALLEN M. TERRELL, JR.
HELEN L. WINSLOW
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
Attorneys for Defendant

cc: Arthur Inden, Esquire
Young, Conaway, Stargatt & Taylor
1401 Market Tower
Wilmington, Delaware 19801
Attorneys for Plaintiffs

Dated: February 6, 1981

[Schedule A thru E have been omitted in printing, but are available in the certified record]

SCHEDULE F

To	For	Cost
Prothonotary	Special Jury Initial Fee	$ 750.00
Prothonotary	Special Jury Costs	7,567.80
Prothonotary	Special Jury Questionnaires	48.00
TOTAL:		$8,315.80

[OPINION OF THE SUPERIOR COURT OF THE STATE OF DELAWARE Dated March 17, 1981]

SUPERIOR COURT OF THE
STATE OF DELAWARE

Judge Bernard Balick

March 17, 1981

Edmund N. Carpenter, II, Esq.
Allen M. Terrell, Jr., Esq.
Helen L. Winslow, Esq.
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One Rodney Square
P.O. Box 551
Wilmington, DE 19899
Attorneys for Defendant

Arthur Inden, Esq.
Ben T. Castle, Esq.
Young, Conaway,
Stargatt & Taylor
1401 Market Tower
P.O. Box 391
Wilmington, DE 19899
Attorneys for Plaintiffs

Counsel:

Re: Lillian M. Haas, et al. v. United Technologies Corporation, et al.
Civil Action No. 1441, 1976
Submitted: February 9, 1981

This is the opinion on the plaintiffs' motion for a new trial.

I will discuss the issues raised under the headings in which they appear in the plaintiffs' motion. On the issues raised at trial, this discussion will supplement the rulings made at trial.

I. COCKPIT BIM

A. The plaintiffs argue that their contention that the visual warning system was defective because it failed to include an indicator in the cockpot was not included in the instructions to the jury, as requested in exhibit A to their motion. They argue in particular that it was error to instruct the jury that the absence of an indicator in the cockpit is ground for liability only if the warning system designed by Sikorsky was defective.

The jury was instructed as follows:

> "The plaintiffs contend that the visual BIM warning system was inadequate because it did not incorporate any warning in the cockpit, it lost credibility as a result of warnings that did not indicate a crack in the blade, and the instructions and warnings in the flight and maintenance manuals were inadequate.
>
> The defendant disputes each of these contentions.
>
> In order to prevent the helicopter [which was defined to include the warning system and the flight and maintenance manuals (AA-29)] from being unreasonably dangerous, Sikorsky was required to design an adequate warning system and to give adequate directions as to its maintenance and use. Although a manufacturer is required to design a product that is not defective and unreasonably dangerous, this does not mean that it is required to include every possible safety device. Thus, if you find that the visual BIM system and applicable manuals were adequate, you may not find Sikorsky liable for failure to install an indicator in the cockpit.
>
> In order to determine that the product was defective and unreasonably dangerous because adequate warnings and instructions were not provided about a danger connected with the helicopter or its proper maintenance or use, you must find that, at the time of manufacture, the likelihood that the product would

> cause harm and the seriousness of the harm rendered the manufacturer's instructions inadequate, and that the manufacturer should and could have provided the instructions or warnings which the plaintiffs allege would have been adequate." (Instructions to Jury, p. 9; Transcript, AA-32, 33)

This is a correct statement of the law. In order to prevail, the plaintiffs must prove that the helicopter was defectively designed. If the jury found that the warning system designed by Sikorsky, with the indicator on the rotor blade, was adequate, it could not find Sikorsky liable for failing to put an indicator in the cockpit. In other words, the plaintiffs could prevail on this contention only if the jury found that an indicator in the cockpit was necessary in order to make the warning system adequate.

B. The plaintiffs argue that the instructions do not include their contention that Sikorsky negligently failed to notify the Navy of the unreasonable danger of the visual BIM system after the helicopter was manufactured, as requested in exhibit C to their motion.

The jury was instructed as follows:

> "The manufacturer of a helicopter owes users of the product a duty to use reasonable care, skill and diligence in the design and manufacture of the product. The manufacturer also has a duty to anticipate all reasonably foreseeable uses of a product and to warn users of the risks arising from reasonable foreseeable uses of the product, if the manufacturer knows, or should know, of such risks, and if such risks would not be obvious to users of the product.
>
> Defendant Sikorsky had a duty to design the helicopter properly. The duty to design a product safety is a duty to use reasonable care to assure that the product will be safe for its intended or reasonably anticipated use. The degree of care required in de-

signing a product depends upon the foreseeable risks involved in the product's intended or reasonably anticipated use.

In addition to the plaintiffs' contentions about the BIM system and instructions and warnings in the manuals at the time the helicopter was manufactured, the plaintiffs contend that Sikorsky failed to use reasonable care to improve the warnings and instructions after the helicopter was manufactured.

Sikorsky denies this and contends that it acted as a reasonably prudent manufacturer would under like circumstances by giving additional warnings or recommendations and urging the Navy to retrofit or install a cockpit BIM system after the helicopter was manufactured, but these matters were then within the Navy's control.

In determining whether defendant Sikorsky was negligent in the design of this helicopter, you must bear in mind that, when matters of human safety are involved, a manufacturer has a continuing duty after manufacture and delivery of the helicopter, to warn users of dangerous defects in the product and to inform them of known dangers in the product or its use.

In other words, in this case, if you find that Sikorsky, as a reasonably prudent manufacturer, should have learned after the product was manufactured that the design or use of the helicopter posed a danger to its operators, then Sikorsky had a duty to act with regard to the danger as a reasonably prudent manufacturer in the same or similar circumstances. This obligation is satisfied if the manufacturer makes reasonable efforts to inform product users or a person who may be reasonably expected to assure that action is taken to avoid the harm, or that the risk of harm is explained to the actual product user.

Examples of factors that you may consider in making this evaluation, in addition to the factors listed on page 9 [AA-33] above, include:

—the nature of the relationship between the manufacturer and the owners and operators after delivery of the product;

—who had control over the manuals and maintenance procedures;

—prior similar accidents;

—communications between the manufacturer and owners or operators.

If you find that there was an unreasonable risk of harm arising from the use of the BIM system and related manuals, and that Sikorsky was or should have been aware of the danger before this crash, it was Sikorsky's duty to act reasonably in attempting to remove that danger. If you find that Sikorsky failed to do this, and that its failure was a proximate cause of the crash, then Sikorsky would be liable.

On the other hand, if you do not find that there was an unreasonable risk of harm arising from the use of the BIM system and related manuals, or you find that there was, but Sikorsky was not and should not have been aware of the danger, or that it acted reasonably in attempting to remove the danger, but this was not done because of unreasonable inaction of the Navy or Marines, then Sikorsky would not be liable." (Instructions to Jury, pp. 13, 14, 15; Transcript, AA-37, 38, 39, 40)

C. Since the court did submit the plaintiffs' connections about the need for a cockpit BIM system to the jury, I understand the plaintiffs' position to be that their contentions on this issue were not submitted in the form requested in exhibits A and C to their motion.

The plaintiffs' claim is based on the alleged inadequacy of the system designed by Sikorsky to warn users when

a rotor blade is going to fracture. They contend not only that the mechanical warning system was inadequate, but also that the warnings in the flight and maintenance manuals were inadequate, and that the defendant negligently failed to warn users of the inadequacy of the system based on knowledge gained after the helicopter was manufactured. There was much evidence and there were many contentions on the adequacy of these various kinds of warnings. One of the contentions was that there should have been an indicator inside the cockpit. There was no effort in the parties' requests or in the court's instructions to summarize all of the evidence or to state all of the contentions. As was explained to the jury (AA-25, 26), the court did not attempt to review the contentions of the parties in detail, but summarized the contentions and then listed several specific factors, based on the evidence and contentions, that the jury could consider in determining whether the various kinds of warnings were adequate. This is the method suggested by the Maryland Court of Appeals in *Phipps v. General Motors Corporation*, Md. Ct. App., 363 A.2d 955, 959 at n. 4 (1976) and by the proposed Model Uniform Product Liability Act. 2A Frumer & Friedman, *Products Liability* § 16E, pp. 3E-44, 45, 46.

Thus, if we consider as an example the various contentions on cockpit BIM as stated in the plaintiffs' motion for a new trial and the defendant's response, each of them relates to one or more of the factors listed in the instructions, such as the following:

> "the technological and practical feasibility of a product designed and manufactured so as to have prevented the harm while substantially serving the likely user's expected needs. In considering this you may consider the state of the art at the time that the product was designed and manufactured (AA-31);
>
> * * * *

the new or additional harms that might have resulted if the product had been so alternatively designed (AA-31);

* * * *

the avoidability of injury by care in use of the product (including the effect of instructions or warnings) (AA-32);

* * * *

the intended or reasonably anticipated use of the product (AA-33);

* * * *

the adequacy of the warnings or instructions that were provided (AA-34);

whether reasonably prudent persons who are likely to maintain and use the product should be expected to understand and follow the warnings and instructions (AA-34)."

Exhibit "A" to the motion requests the court to instruct that it was the duty of Sikorsky to provide adequate warnings, and that the plaintiffs contend that the warning system was defective because it gave false alarms for various reasons and because it did not include an indicator in the cockpit. These instructions were given in substance, but the following specific request was not included:

"Specifically, the Plaintiffs contend that the visual 'BIM' system was defective as a warning in that:

—It signaled losses in blade pressure which were caused by problems unrelated to developing cracks in the blade; in that

—It signaled losses in blade pressure when there were no such pressure losses in fact; and in that

—The most frequent cause of 'black BIM' warning signals were malfunctions in the visual 'BIM' system itself, which encouraged disrespect for the

'BIM' system as a warning, thus defeating its intended purpose."

This contention was adequately covered by the instruction that "[t]he plaintiffs contend that the visual BIM warning system was inadequate because . . . it lost credibility as a result of warnings that did not indicate a crack in the blade. . . ." (AA-32). The evidence established that the crack existed before takeoff on the morning of the fatal flight and that it was indicated by the warning system on several occasions. The warning system did not fail to indicate a crack. It was the contention of the plaintiffs that the system lost credibility because of frequent "false alarms," thus undermining the response of the maintenance personnel and crew. The defendant, on the other hand, disputed the claimed frequency of warning signals resulting from causes other than a crack in a rotor blade, and contended that they were not "false alarms" but rather indicated the need to service the warning system itself. The basic contentions were that there were frequent warnings when there was no crack in a blade and that the warnings therefore lost credibility. It was not necessary to include the plaintiffs' contentions as to why the "false alarms" occurred in the instructions. These more detailed contentions were more suitable for closing argument to the jury. In short, aside from unnecessarily specific contentions, the instructions included the substance of the plaintiffs' requests.

II. OTHER CRITICISMS OF THE INSTRUCTIONS ON THE DOCTRINE OF STRICT LIABILITY AND CAUSATION

A. The Implication of Fault Concept, B. Unreasonably Dangerous, and C. Guarantor of Product Safety. The plaintiffs' position on these issues is based on the Pennsylvania approach to products liability. Since this case was controlled by Maryland law, the court followed the

Maryland approach, as stated in *Phipps v. General Motors Corporation, supra.*

D. Concurrent Causes. This instruction was directed toward the alleged intervening negligence of the Marine Corps maintenance personnel. The court instructed the jury that there can be more than one proximate cause and instructed on § 447 of Restatement of Torts 2d, as requested in exhibit F to the motion. Only the following request was omitted:

> "In order for Sikorsky to derive any benefit from the alleged negligence of the Marine Corps personnel, you must find that such negligence was the *sole* and exclusive cause of the accident.

This instruction would have been confusing. The plaintiffs' request and § 447 deal with the issue raised by the alleged intervening negligence of the Marine Corps maintenance personnel. The issue arises only if earlier negligence of Sikorsky (or "defect," to use the strict liability term) was a cause of the harm. The requested instruction suggests that intervening negligence by the maintenance personnel would relieve Sikorsky of liability ("superseding cause," in the language of the Restatement) only if there were no negligence by Sikorsky in the first place. This is incorrect. Intervening negligence may relieve an actor of liability even though his earlier negligence is also a cause of the harm. Restatement, Second, Torts § 440; Prosser's Hornbook (4th ed.) § 44. In short, aside from confusing language, the substance of the plaintiffs' request was given.

On this subject, I would note that it is much more likely that the jury denied liability because it found that the warning system and maintenance manual were adequate than it is that it denied liability because of the intervening negligence of the maintenance personnel. Negligence of the maintenance personnel would be an intervening

cause only if the warning system were found defective because the maintenance manual was inadequate. It would not be an intervening cause if the warning system were found defective because it did not include a signal in the cockpit. The reason for this is that the alleged negligence of the maintenance personnel actively operated after the alleged antecedent negligence of Sikorsky in designing the maintenance manual, but before the allegedly negligent failure to include a signal in the cockpit would have actively operated to produce the harm. In other words, there would have been a warning signal in the cockpit after the maintenance personnel negligently failed to heed the earlier warning signals. Restatement, Second, Torts § 441, Prosser's Hornbook (4th ed.) p. 271.

The plaintiffs' contention that the instructions and warnings in the maintenance manual were inadequate and the defendant's contention that there was intervening negligence by the maintenance personnel were in large part based on differing inferences from the same evidence. On these issues, the jury was instructed to consider, among other factors, "the clarity and conspicuousness of the warnings or instructions that were provided; the adequacy of the warnings or instructions that were provided; and whether reasonably prudent persons who are likely to maintain and use the product should be expected to understand and follow the warnings and instructions." (AA-33, 34). Although perhaps theoretically possible, it is unlikely that the jury found that the manual was inadequate, but that the maintenance personnel were nevertheless so extraordinarily negligent as to relieve the defendant of liability, especially when the contention about the system's loss of credibility is also considered. The more likely alternative findings on the evidence were either (1) the manual was inadequate and the maintenance personnel were not negligent or their negligence should have been foreseen, or (2) the manual was adequate and the maintenance personnel were negli-

gent. The jury apparently found alternative (2). It is thus most likely that liability was denied because there was no negligence by Sikorsky, not because there was superseding negligence by the maintenance personnel.

III. THE VERDICT AGAINST MARK LAMASCUS WAS AGAINST THE COMPELLING WEIGHT OF THE EVIDENCE

This contention is based on the assumption that the jury found for the defendant on the issue of assumption of risk or contributory negligence, since these defenses did not apply to Mark Lamascus, who was merely a passenger in the helicopter. The jury could have found that the helicopter was not defectively or negligently designed and that there was no negligence after the date of manufacture. It therefore follows that the verdict against Mark Lamascus was not against the compelling weight of the evidence.

IV. IT WAS ERROR TO PERMIT THIS CASE TO BE DECIDED BY A SPECIAL JURY

The statutory provision for special juries has been upheld as valid under the State and Federal Constitutions. *Nance v. Rees*, Del. Supr., 161 A.2d 795 (1969); *Fay v. New York*, 332 U.S. 261 (1947). No later federal authority holding special juries invalid under the Federal Constitution has been cited. The provisions for random selection of regular jurors do not apply to special jurors. Compare Subchapters I and II of Chapter 45 of Title 10 of the Delaware Code. Although special jurors are in practice selected from among regular jurors who have completed their term of service, they are not selected randomly. Those persons are selected who are considered more suitable for complex civil cases because of their education and experience. Thus, by definition the general level of education and experience of special jurors is expected to differ from that of regular jurors or the population at large. This is the purpose of special juries.

Since special juries have been upheld as constitutional, it follows that the fact that a special jury is generally better educated than the population at large does not make it unconstitutional.

The only other specific contention is that women were underrepresented. If we accept the affidavit in support of the plaintiffs' motion as accurate, 34% of the then current special jury pool were female as compared with 53% of the general population of the County. It is not clear how the percentage of females among those drawn for this case before being struck, excused, or challenged compares with the percentage of females among all persons who are eligible for jury service. Even if we assume that the number of females in the pool is usually near this percentage, it is nevertheless apparent that females are not excluded from service as special jurors and that a substantial percentage of the jury impanelled for this case were female (5 out of 18 or 28%). The plaintiffs have cited no authority requiring a non-random system to include all groups in the same percentage as they appear in the general population.

For these reasons, the plaintiffs' motion for a new trial is denied. The defendant is requested to submit an order.

My secretary will schedule an office conference for presentation of the defendant's motion to treat the expenses of the special jury as part of the costs of the case.

Very truly yours,

/s/ Bernard Balick
BERNARD BALICK

BB:ipm

cc: Superior Court Administrator
Law Libraries
Prothonotary

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1441, 1976

LILLIAN M. HAAS, *et al.*,
Plaintiffs,

v.

UNITED TECHNOLOGIES CORPORATION, *et al.*,
Defendants.

PLAINTIFFS' MOTION FOR NEW TRIAL PURSUANT TO CIVIL RULE 59

Plaintiffs, by and through their undersigned counsel, hereby respectfully move the Court to grant a new trial pursuant to Civil Rule 59 on the below-listed grounds. This motion is predicated on the assumption (1) that the jury exonerated Sikorsky of any negligence and concluded that its product was not defective, *or* (2) that there was no proximate cause link between any negligence or product defect and the accident. This reasoning necessarily follows from the fact that Mark Lamascus, the passenger-decedent whose claim was not subject to any affirmative defenses, was denied a verdict.

I. COCKPIT BIM

A. The plaintiffs requested that the Court instruct the jury (in the form attached hereto as Exhibit "A") that it could find defendant liable under the doctrine of strict liability for failure to incorporate an in-cockpit warning device which would have indicated to the pilot while the helicopter was in flight that there was a loss of nitrogen pressure in the blade spar and would have caused or permitted him to land the helicopter immediately and thus avoid the catastrophic blade failure that occurred in this case. The Court declined to grant that instruction and

instead told the jury the following on the subject of the cockpit BIM:

> "The plaintiffs contend that the visual BIM warning system was inadequate because it did not incorporate any warning in the cockpit, * * *
>
> "The defendant disputes each of these contentions.
>
> "In order to prevent the helicopter from being unreasonably dangerous, Sikorsky was required to design an adequate warning system and to give adequate directions as to its maintenance and use. Although a manufacturer is required to design a product that is not defective and unreasonably dangerous, this does not mean that it is required to include every possible safety device. Thus, if you find that the visual BIM system and applicable manuals were adequate, you may not find Sikorsky liable for failure to install an indicator in the cockpit." (Instructions to the Jury, Page 9)

This was the sole mention of the cockpit BIM contention in the strict liability context. This instruction conditioned a finding of liability against Sikorsky for failure to install a cockpit BIM on an underlying finding that the visual BIM system and its manuals were inadequate. This particular instruction was opposed by the plaintiffs. The only request made by the defendant concerning the cockpit BIM contention was as shown on Exhibit "B" attached hereto.*

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* The defendant also, of course, moved for a directed verdict on the ground that there was insufficient evidence regarding the plaintiffs' contention about the cockpit BIM to even submit that issue to the jury. This motion was denied: "I will instruct on the contention on cockpit BIM but my plan is to do that in connection with the contention on the defectiveness of the visual BIM system. I don't understand the Dorsey case to support the proposition for which it was argued, which I understand to be that even if the jury finds that the visual BIM system was not defective, it can find the Defendant liable because it did not design a cockpit BIM system." (Trial Tr. Vol. W, Page 110)

B. On the issue of negligence, the plaintiffs again requested that the Court instruct that Sikorsky could be found liable for failure to incorporate a cockpit BIM in the form attached hereto as Exhibit "C". However, the Court declined to grant that request and said only the following in the context of the negligence instruction to the jury:

> "* * * the plaintiffs contend that Sikorsky failed to use reasonable care to improve the warnings and instructions after the helicopter was manufactured.
>
> "Sikorsky denies this and contends that it acted as a reasonably prudent manufacturer would under like circumstances by giving additional warnings or recommendations and urging the Navy to retrofit or install a cockpit BIM system after the helicopter was manufactured but these matters were then within the Navy's control." (Instructions to the Jury, Page 14)

Other than as set forth in this motion there was no other mention of the cockpit BIM issue in the jury instructions.

C. The plaintiffs contended that the Sikorsky helicopter involved in this crash was defective at the time of manufacture because it did not incorporate a cockpit BIM and they further contended that Sikorsky was negligent in its failure to provide a properly functioning cockpit BIM after the helicopter was manufactured. There was ample evidence to warrant submission of these issues to the jury for its consideration and, we respectfully submit, it was error to refuse to submit these issues and this error went to the heart of the plaintiffs' case. Some of the evidence that warranted submission of these crucial issues to the jury was as follows:

1. Sikorsky had developed and offered to the United States Air Force a cockpit BIM warning device at least as early as 1967, which was prior to the December, 1969

manufacture of the CH-53D that crashed in this case (Dixon, Trial Tr. Vol. R, Pages 91-92; Vol. O, Pages 70-71).

2. The radioactive cockpit BIM system was recommended to Sikorsky by Mr. Dixon in the "late sixties" and rejected by higher management (Heick, Trial Tr. Vol. C, Pages 47-49; Dixon, Trial Tr. Vol. O, Page 82). Mr. Dixon testified that in his view it was "a good system" (Dixon, Trial Tr. Vol. R, Page 74), and that he had made a patent disclosure on it in 1967 (*Ibid*, Page 85).

3. There was evidence from the design specifications for "our" helicopter that it was capable of missions well in excess of two hours by the use of range extension fuel tanks and hot or single-point pressure refueling techniques (Defendant's Exhibit No. 67, at Pages 54, Item 3.12.9.3.3 and 55, Item 3.12.9.13). Mr. Dixon, the defendant's lead witness, initially testified emphatically that the design specifications did not provide for these longer missions (Dixon, Trial Tr. Vol. O, Page 33), and that was the reason for omitting the cockpit BIM—"* * * we only needed a visual system. We did not need a cockpit system." (Dixon, Trial Tr. Vol. O, Page 34) Mr. Dixon later conceded under cross-examination that the specifications did allow for hot refueling (Dixon, Trial Tr. Vol. R, Page 146), for fuel extension tanks and, thus, longer-range missions. (Dixon, Trial Tr. Vol. R, Page 149-152). With the capability of longer-range missions the visual BIM two-hour inspection intervals are not safe.*

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* The significance of the two-hour mission requirement is that Sikorsky contended that the visual BIM system was appropriate to catch any incipient blade cracks because the crack propagation time of the aluminum-extruded blades was such that it would afford ample opportunity to discover a crack at the two-hour inspection intervals. (Dixon, Trial Tr. Vol. O, Pages 33-34) This rationale did not apply to the longer-range RH-53D. (Heick, Trial Tr. Vol. C,

4. The defendant's witness, Major Wolfe, whose deposition testimony was read, testified that the CH-53D's were always used in Viet Nam for long-range flights well in excess of two hours and that this had been true from the very beginning, which was prior to 1969, and that Sikorsky was aware of this extended-range capability and extended-range practice (Wolfe Deposition, Pages 79-87; Trial Tr. Vol. —, Page —). (Also, Heick, Trial Tr. Vol. C, Page 83)

5. The importance of the cockpit BIM as a warning device to the pilot was heard by the jury in various ways, perhaps most importantly from Mr. Goldberg who said:

> "* * * a system with a low crack propagation rate blade has to be incorporated so that you have continuous monitoring, so that the minute that crack goes through the wall thickness, a light or an indication will tell you that you have lost pressure or that crack is through the wall thickness and not wait two hours or four hours, if it occurs at the beginning of a flight, until you land.
>
> "You have to have a continuously monitoring system so that the commander of that aircraft knows that he has a problem." (Goldberg, Trial Tr. Vol. J, Page 114)

This same point was also made by the defendant's metallurgical witness, Professor McEvilly, who indicated that once there is a crack in the blade and it has been signalled to the pilot the helicopter should be *immediately* landed and the blade removed (McEvilly, Trial Tr. Vol. T, Page 52), and by the defendant's own document stating that the cockpit BIM was 700 times more reliable than the visual BIM (Plaintiffs' Exhibit No. 57).

Pages 81, 82, 84) On the day of our accident the helicopter had been hot refueled after leaving New River, North Carolina, and the rotor system had been in operation for a total of 2 hours and 42 minutes before the blade fractured.

6. In addition to the foregoing evidence it is a matter of common sense that a warning device in the cockpit would have alerted Lt. Ruff after his departure on January 8, 1975 that there was a loss of spar pressure, and that would have provided him with an opportunity to immediately land the helicopter and thus avoid the tragedy that occurred.

7. Proof of the feasibility of the cockpit BIM prior to the manufacture of "our" helicopter is the attached Sikorsky letter dated August 2, 1968, which specifically

> ". . . recommends the incorporation of a cockpit BIM® warning system in all HH-53B/C helicopters. The proposed system will provide an in-flight indication of main rotor blade spar integrity, which under long range flight operations will provide enhanced mission reliability, offer an increased confidence level by the air crew and allow corrective action should the 'Blade Pressure' light become illuminated." (Exhibit "D" hereto)

Mr. Dixon's trial testimony confirmed this when he said:

> "The original effort with the Air Force goes back in the 60's when they got their aircraft with the extended fuel and the air-refueling capability. We told the Navy then that it was being submitted to them, to the Air Force, but that with their—with their operation of two hours, it is not required of the Marine Corps." (Dixon, Trial Tr. Vol. O, Page 54)

Mr. Dixon went on to say that Sikorsky became "concerned" about the lack of a cockpit BIM because the aircraft were being used for extended missions in the early '70's and "talked with them [Navy] in earnest about trying to do something with cockpit BIM." (Dixon, Trial Tr. Vol. O, Page 56)

8. Plaintiffs' Exhibit No. 55, the "Stave 61% memo", dated November 11, 1974 (attached as Exhibit "E"

hereto), points out the distinctive purposes of the cockpit BIM:

> "With the advent of cockpit BIM, however, pilots now know that blade pressure has been lost while they are in the midst of a mission. Once this occurs, the pilot can take one of several actions, from ignoring the BIM light to making an immediate emergency landing."

D. The evidence was sufficient to permit the jury to conclude that the cockpit warning device was a critical safety feature in a product (i.e. blade) that was expected to fail, that it was feasible to install cockpit BIM in the helicopter at the time of its manufacture, that Sikorsky (if not Mr. Dixon personally) certainly knew about the capability for longer range missions and the actual use of the aircraft for these purposes in the 1960's, and that if present it could well have avoided this accident on this flight (which involved hot refueling). Under the following uniform authorities it was error to withdraw this basic issue from the jury for its consideration. *Bexiga* v. *Havir Manufacturing Corp.*, N.J. Supr., 290 A.2d 281, 285 (1972) ["the jury could infer from plaintiffs' evidence that it was feasible for Havir to install the (safety) device"]* *Barker* v. *Lull Engineering Co.*, Cal. Supr., 573 P.2d 443 (1978); *Bell Helicopter Co.* v. *Bradshaw*, Tex. Civ. App., 594 S.W. 2d 519 (1979); *Dorsey* v. *Yoder Company*, 331 F. Supp. 753, 760 (E.D. Pa. 1971); *Azzarello* v. *Black Bros. Co., Inc.*, Pa. Supr., 391 A.2d 1020 (1978); *Roy* v. *Star Chopper Co., Inc.*, D.C.R.I., 442 F.Supp. 1010 (1977); *Leach* v. *Jagenberg-Werke A.G.*, D.C. Pa., 480 F.Supp. 244 (1979); *Kerns* v. *Engelke*, Ill. App., 390 N.E. 2d 859 (1979); *Shanks* v. *A.F.E. Industries, Inc.*, Ill. App., 403 N.E. 2d 849 (1980); Model U.P.L.A. §§ 104(B) and 104(C). Powell

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* *Bexiga, supra*, has been cited with approval in at least fifteen jurisdictions.

and Hill, *Proof of a Defect or Defectiveness*, 5 U. Balt L. Rev. 77 (1975), cited with approval in *Eaton Corp.* v. *Wright*, Md. Ct. App., 375 A.2d 1122, 1127 (1977), a strict liability case; *Phipps* v. *General Motors Corporation*, Md. Ct. App., 363 A.2d 955 (1976); *Lubbock Mfg. Co.* v. *Perez*, Tex. Civ. App., 591 S.W. 2d 907 (1979); *General Motors Corp.* v. *Turner*, Tex. Civ. App., 567 S.W. 2d 812 (1978) [lists factors for jury to consider in deciding whether design is defective]; *Schnell* v. *AMF, Inc.*, C.A. 3, 567 F.2d 1259 (1977).

II. OTHER CRITICISMS OF THE INSTRUCTIONS ON THE DOCTRINE OF STRICT LIABILITY AND CAUSATION

Plaintiffs are critical of other portions of the jury instructions that bore on the issue of defendant's liability. The instructions were of particular significance here because each juror had a copy for ready reference throughout the deliberations and the "special jury", to which plaintiffs objected, had a higher level of formal education than a cross-section of the population in New Castle County and could, therefore, be expected to attach particular significance to the Court's instructions. The areas in question are as follows:

A. *The Implication of Fault Concept.*

It was erroneous to instruct the jury that an alleged product defect implies fault. (Instruction to Jury at Page 4) *Berkebile* v. *Brantley Helicopter Corporation*, Pa. Supr., 337 A.2d 893 (1975), expressly disavows this entire approach. "Section 402A recognizes liability *without fault* * * *" (emphasis in original), at Page 89; "The crucial difference between strict liability and negligence is that the existence of due care, whether on the part of seller or consumer, is irrelevant." (at Page 89) The instruction to the jury here compared negligence and strict liability (Page 4) and clearly stated that in order

to find that Sikorsky manufactured a defective product it must find that someone was at fault. This was erroneous and at odds with the entire concept of strict liability.

B. *Unreasonably Dangerous.*

In order to determine liability the jury would first have to conclude that the defective product was "unreasonably dangerous"; however, that suggests that a helicopter rotor blade known to be subject to in-flight failure and equipped with a defective outside warning system and not equipped with any cockpit warning system could somehow be "reasonably" dangerous. This issue should have been resolved by the Court as a matter of law under the rationale of *Berkebile, supra; Azzarello, supra; Barker, supra; Cronim* v. *J.B.E. Olson Corp.*, Cal. Spr., 501 P.2d 1153 (1972); and *Baker* v. *Outboard Marine Corp.*, C.A. 3, 595 F.2d 176 (1979).

C. *Guarantor of Product Safety.*

Although the Court told the jury that the defendant was not an insurer, it declined to complete the statement by telling the jury that the manufacturer does guarantee the "safety of its product". This, we submit, was error. *Azzarello, supra.*

D. *Concurrent Causes.*

The defense concentrated very heavily on the so-called "AMB", (Plaintiffs' Exhibit No. 28), the report of the accident which assigned responsibility for the crash to Marine Corps' maintenance dereliction. The AMB did not address any of the issues of Sikorsky liability, i.e. the shortcomings in the visual BIM system, the problem of false warnings, or the absence of a cockpit indicator; thus it was most important that the jury receive a comprehensive and correct explanation of the role of multiple causes contributing to an accident. Plaintiffs requested

an instruction in the form attached as Exhibit "F". That instruction was not given; instead the jury was told about "intervening negligence" in complicated and confusing language (Page 18). We submit this was error which had particular importance in the circumstances of this case. *Restatement (Second) of Torts*, § 447.

III. THE VERDICT AGAINST MARK LAMASCUS WAS AGAINST THE COMPELLING WEIGHT OF THE EVIDENCE

The compelling, if not overwhelming, weight of the evidence which the jury did consider established (1) that the Sikorsky visual BIM system did not work as it was intended to work since false warnings were rampant and not kept to an "absolute minimum"; (2) that the accompanying maintenance manuals tacitly admitted the problem with a complicated "troubleshooting procedure" which permitted young Marine mechanics to search out the BIM problem while the blade remained on the helicopter; (3) that the black BIM indication on the blade that fractured was never ignored but rather repeatedly and unsuccessfully troubleshot; and (4) that between April 29, 1974 and January 10, 1975, Sikorsky knew of the BIM problems, drafted a corrective maintenance procedure ("take the blade off"), sat idly by through the KLM S-61 crash on May 10, 1974, and the Alameda CH-53 crash on July 27, 1974, and, finally, after the January 8, 1975, crash issued the manual change. While there was evidence of Marine Corps' maintenance errors it was, we submit, compellingly demonstrated that the defendant's combined inadequate system, misleading manuals and inaction set the stage for the January 8, 1975, calamity. The plaintiffs' evidence on this point came mainly from Dr. Cunitz, a human factors engineer. While the defense listed four human factors engineers as witnesses in the pre-trial order it declined to call one and Dr. Cunitz' professional opinion was unrebutted.

Airman Lamascus was an uninformed and uninvolved passenger not subject to any affirmative defenses. The verdict against him was manifestly and palpably against the great weight of the evidence* and justice would miscarry if it were allowed to stand. *McCloskey* v. *McKelvey*, Del. Super., 174 A.2d 691 (1961); *Peters* v. *Gelb*, Del. Supr., 314 A.2d 901 (1973). cf. *O'Keefe* v. *The Boeing Company*, D.C. N.Y. 335 F.Supp. 1104 (1971).

IV. IT WAS ERROR TO PERMIT THIS CASE TO BE DECIDED BY A SPECIAL JURY.

Plaintiffs, prior to commencement of the trial, moved to prevent the impaneling of a special jury contending that the Delaware procedure was unconstitutional both on its face and in practice (Exhibit "G" attached hereto). The Court denied that motion on the basis of *Nance* v. *Rees*, Del. Supr., 161 A.2d 795 (1960); *Fay* v. *New York*, 332 U.S. 261 (1947) (Exhibit "H" attached hereto). Plaintiffs hereby renew that motion** requesting a new trial before a regular jury, and attach as a further part of the record the questionnaires of the special jurors who actually determined this cause as Exhibits "I" through "T" hereto. * * * We respectfully point out that this particular jury (and the pool from which it was selected) was heavily biased against the female sex; this jury consisted of 10 men and 2 women. We submit that the lopsided sex orientation is a direct product of the special jury informal selection process whereby jurors are selected primarily on the basis of education with the con-

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* This again stresses the importance of the "concurrent cause" instruction requested by plaintiffs.

** Plaintiffs anticipate that the Court will decline to grant this motion for the reasons announced earlier.

*** Incorporated by reference are the questionnaires of all the special jurors who were summoned to decide this case.

sequence that more men than women are selected because of the prevalence of higher education among career-oriented males (in this age group). It also stemmed from the fact that the defendant in the preliminary striking procedure devoted all of its strikes to eliminating female panelists, and then exercised its at-trial strikes to eliminate two other female panelists. The plaintiffs here were all women and through the special jury device were deprived of a trial by a fair cross-section of our community determined both by educational background and sex.

Respectfully submitted,

/s/ Arthur Inden
ARTHUR INDEN

/s/ Ben T. Castle
BEN T. CASTLE
Young, Conaway, Stargatt & Taylor
1401 Market Tower
P.O. Box 391
Wilmington Delaware 19899
Attorneys for Plaintiffs

Dated: January 28, 1981

[Exhibits A thru F and H thru T have been omitted in printing, but are available in the certified record]

EXHIBIT G

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1441, 1976

LILLIAN M. HAAS, Personal Representative of the Estate of and parent and next of kin of John V. Cataldi, deceased; CHERYL RUFF, personal representative of the Estate of and widow of and next of kin of Edwin J. Ruff, Jr., deceased; BETTY LOU SCHLECTIC BAHE, as guardian and next friend of Ginger Schlectic, minor child of Ralph C. Schlectic, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS, personal representative of the Estate of and widow of and next of kin of Mark Lamascus, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS as guardian and next friend of Sarah Laine Lamascus and Mark David Lamascus, minor children of Mark Lamascus, deceased,

Plaintiffs,

v.

UNITED TECHNOLOGIES CORPORATION, a Delaware corporation, UNITED AIRCRAFT CORPORATION, a Delaware corporation, UNITED AIRCRAFT CORPORATION OF NEW YORK CITY, a Delaware corporation, and THE SIKORSKY DIVISION OF UNITED TECHNOLOGIES CORPORATION,

Defendants.

PLAINTIFFS' MOTION TO PREVENT IMPANELING OF SPECIAL JURY AT REQUEST OF DEFENDANTS AND TO ORDER TRIAL BY ORDINARY JURY

NOW COME plaintiffs, by and through their undersigned counsel, and hereby move this Court for the below-stated reasons to bar the impaneling of a special jury at

the request of the defendants and to order that this case be tried before an ordinary common-law petit jury, which would at least offer the possibility of constituting a jury of plaintiffs' peers within the meaning of the Constitutions of the State of Delaware and of the United States of America. This motion is advanced on the following grounds and for the following reasons:

1. There has been no specific order by this Court directing the impaneling of a special jury for the trial scheduled to commence December 1, 1980.

2. The Delaware statute which provides for a special jury, 10 *Del. C.* §§ 4541-4543, is on its face unconstitutional within the meaning of the Equal Protection and Due Process Clauses of the Constitution of the State of Delaware, Article 1, Sections 4 and 9, and of the Seventh and Fourteenth Amendments of the Constitution of the United States for the reasons that: (a) it establishes artificial and discriminatory jury classifications; (b) it results in non-random selection of a jury that is not a fair cross section of the County; (c) it permits a party with financial resources at its disposal, normally the defendant in civil litigation, to obtain a jury which is restricted by education, employment opportunities and privileges generally to a class of the population whose interests are considered compatible with and biased in favor of the requesting party; and, (d) it permits the defendant in civil litigation to secure a jury that is normally "defense oriented", *Nance* v. *Rees*, Del. Supr., 161 A.2d 795 (1960), and thus not impartial.

3. The special jury procedure provided for in 10 *Del. C.* §§ 4541-4543 does not provide objective criteria for the selection of special jurors and, in fact, provides no criteria for the selection of special jurors other than the Prothonotary's subjective selection of "indifferent and judicious citizens of the county." Section 4541(b). On

its face this absence of jury selection criteria in 10 *Del. C.* § 4541 conflicts with and violates the ordinary jury selection policy enunciated in 10 *Del. C.* § 4501 and permits (indeed encourages) the selection of a jury on the basis of discrimination in violation of 10 *Del. C.* § 4503.

4. The special jury panel selected for this particular case is not a fair cross section of New Castle County. For example, according to the Statistical Abstract* the Educational Characteristics of the New Castle County population reflect that approximately 16% of the over-25 population has attended college; the comparable figure for the instant special jury panel is 83.8%. And while 40% of the general over-25 population in New Castle County does not have a high school education, only one member of this special jury panel is in that category. Racially, according to the same source 13% of the New Castle County population is non-white; only 4% of this panel is. By sex this panel is 62% male and 38% female; the general population in this County is 53% female and 47% male. While economic data concerning the panel is not of record it is reasonable to infer that the economic circumstances of this highly educated segment of society are more comfortable than would be represented by a fair cross section of the community.

5. The procedure utilized by the Prothonotary to select special jurors is not mandated by statute. The Prothonotary, or his designate, simply "culls" from the list of ordinary petit jurors those who in the judgment of the selector qualify as special jurors by reason of training, education or experience as disclosed in answer to questionnaires such as those annexed here as Exhibits A, B, and C. This procedure is not regulated by statutory guidelines in any predictable or consistent manner and

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* Statistical Abstract for the State of Delaware—1978 Edition

will surely result in the selection of a panel that is not a representative cross section of the community.

/s/ Arthur Inden
ARTHUR INDEN

/s/ Ben T. Castle
BEN T. CASTLE
Young, Conaway, Stargatt & Taylor
1401 Market Tower
P.O. Box 391
Wilmington, Delaware 19899
Attorneys for Plaintiffs

Dated: November 7, 1980

Attachments

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1441, 1976

LILLIAN M. HAAS, *et al.*,
Plaintiffs,
v.
UNITED TECHNOLOGIES CORP., *et al.*,
Defendants.

AFFIDAVIT

STATE OF DELAWARE)
) ss:
NEW CASTLE COUNTY)

BE IT REMEMBERED, that on this 30th day of January, 1981, personally appeared before me, a Notary Public for the State and County aforesaid, FREDERICK KIRCH, Court Administrator, Superior Court, who, being duly sworn by me, did depose and say that:

1. The Office of the Prothonotary for New Castle County maintains a listing or pool of voters eligible to serve as "special jurors" as provided for in 10 *Del. C.* § 4541.

2. Prior to October, 1980, it is not known which staff employees of the Prothonotary's office selected those names appearing on this listing of special jurors.

3. Prior to October, 1980, it is not known what guidelines or criteria were used by the staff in the selection process of the special jury pool, nor are the reasons known why these persons were considered eligible to serve as special jurors.

4. Several of the special jurors who decided *Haas, et al. v. U.T.C., et al.* were selected and placed in the special jury pool prior to October, 1980.

5. It is not known when or over what periods of time prior to October, 1980 the selection of the special jury pool occurred. Several names currently listed as special jurors have been in the pool for many years.

6. It has been the practice in the Prothonotary's office to return the names of special jurors to the eligible pool after they have completed jury duty.

7. The current special jury pool contains a total of 263 names; 174 or 66.1% are men and 89 or 33.8% are women.*

8. The procedure for selecting persons eligible to serve as special jurors was revised in October, 1980 in the following manner. Copies of qualifying petit juror questionnaires of persons who had served previously as jurors were reviewed by the Jury Commissioners (who are appointed by the Superior Court judges pursuant to 10 *Del. C.* § 4501). They selected from these questionnaires persons they considered eligible to serve as special jurors.

9. The Jury Commissioners did not receive any guidelines or instructions to assist them in their selection process.

10. The Jury Commissioners elected to use education and age as their criteria. They selected persons with more than 12 years of formal education and intentionally avoided selecting persons either in their twenties or seventies.

11. The names of persons selected by the Jury Commissioners were added to the special jury pool in the Office of the Prothonotary.

12. When a request for a special jury is received a clerk in the Office of the Prothonotary pulls the required

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* One of my duties as Court Administrator is to review petit juror lists monthly and prepare statistical data relating to the composition of petit jury panels. This is not done with the special jury list.

number of names at random from this pool and then prepares a list for attorney pre-trial striking as provided in 10 *Del. C.* § 4541. The list of special jurors for the captioned case was prepared in this manner.

13. Attached as Exhibits "A" and "B" are statistics reflecting the State of Delaware Superior Court civil trial activity for years 1979 and 1980 as published in the *Annual Report of the Delaware Judiciary*. They show, among other things, the number of special jury trials held in each county.

/s/ Frederick Kirch
FREDERICK KIRCH

SWORN TO AND SUBSCRIBED before me that day and year first above-written.

/s/ Michael E. Indellin
Notary Public

My Commission Expires: April 30, 1982

EXHIBIT "M"

FISCAL YEAR 1979

CIVIL TRIAL ACTIVITY

	# of Jury Trials	# of Non-Jury Trials	# of Special Jury Trials	Total # of Trials	Days In Trial	Average Length Per Trial
New Castle	66	52	4	122	234.54	1.92 days
Kent *	33	4	0	7	N.A.	N.A.
Sussex	5	13	0	18	N.A.	N.A.
State	74	69	4	147	N.A.	N.A.
Percentage of Total:	50.3%	46.9%	2.7%	100.0%		

CIVIL CALENDAR ACTIVITY

	Cases Tried		Cases Settled or Dismissed		Cases Continued for Settlement		Cases Continued Due to Lack of Judge		Cases Continued at Request of Attorney		Total Trials Scheduled	
New Castle	138	16.2%	316	37.1%	12	1.4%	61	7.2%	325	38.1%	852	100.0%
Kent *	7	8.1%	30	34.8%	6	7.0%	2	2.3%	41	47.7%	86	100.0%
Sussex	18	11.9%	50	33.1%	3	2.0%	2	1.3%	78	51.7%	151	100.0%
State	163	15.0%	396	36.4%	21	1.9%	65	6.0%	444	40.8%	1,089	100.0%

N.A. = Not Available

* Kent County information not available for July 1978 through February 1979.

Source: New Castle County, Kent County, and Sussex County Prothonotaries

EXHIBIT "P"

FISCAL YEAR 1980
CIVIL TRIAL ACTIVITY

	# of Jury Trials		# of Non-Jury Trials		# of Special Jury Trials		Total # of Trials	
New Castle	71	51.4%	65	47.1%	2	1.4%	138	100.0%
Kent	9	34.6%	17	65.4%	0	0.0%	26	100.0%
Sussex	7	30.4%	16	69.6%	0	0.0%	23	100.0%
State	87	46.5%	98	52.4%	2	1.1%	187	100.0%

CIVIL CALENDAR ACTIVITY

	Cases Tried		Cases Settled or Dismissed		Cases Continued for Settlement		Cases Continued Due to Lack of Judge		Cases Continued at Request of Attorney		Total Trials Scheduled	
New Castle	138	17.9%	294	38.1%	10	1.3%	15	1.9%	314	40.7%	771	100.0%
Kent	26	9.1%	87	30.4%	34	11.9%	61	21.3%	78	27.3%	286	100.0%
Sussex	34	22.2%	26	24.1%	3	2.8%	5	4.6%	50	46.3%	108	100.0%
State	188	16.1%	407	34.9%	47	4.0%	81	7.0%	449	37.9%	1,165	100.0%

Source: New Castle County, Kent County, and Sussex County Prothonotary's Office.

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1441, 1976

LILLIAN M. HAAS, *et al.*,
Plaintiffs,

v.

UNITED TECHNOLOGIES CORPORATION, *et al.*,
Defendants.

APPLICATION FOR SPECIAL JURY

Defendants hereby apply for a special jury, pursuant to Rule 40(b), Civil Rules of the Superior Court, for trial of the above-captioned action scheduled before the Honorable Clarence W. Taylor, to commence November 4, 1979.

/s/ Allen M. Terrell, Jr.
ALLEN M. TERRELL, JR.
Richards, Layton & Finger
4072 DuPont Building
P.O. Box 551
Wilmington, Delaware 19899
Attorneys for Defendants

Dated: September 27, 1979

cc: Prothonotary

[OPINION OF THE SUPERIOR COURT
Dated November 26, 1980]

SUPERIOR COURT OF THE
STATE OF DELAWARE

Judge Bernard Balick

November 26, 1980

Arthur Inden, Esq.	Edmund N. Carpenter, II, Esq.
Ben T. Castle, Esq.	Allen M. Terrell, Jr., Esq.
Young, Conaway,	Helen L. Winslow, Esq.
Stargatt & Taylor	Richards, Layton & Finger
1401 Market Tower	One Rodney Square
P.O. Box 391	P.O. Box 551
Wilmington, DE 19899	Wilmington, DE 19899
Attorneys for Plaintiffs	Attorneys for Defendants

Counsel:

Re: Haas, et al. v. United Technologies Corporation, et al.
1441 Civil Action 1976
Submitted: November 18, 1980

This is the opinion and order on the plaintiffs' objection to use of a special jury on the ground that it is inconsistent with the constitutional requirement that the jury panels must represent a fair cross section of the community.

Special juries have been upheld as constitutional by the Supreme Court of Delaware and the United States Supreme Court. *Nance v. Rees*, Del. Supr., 161 A.2d 795 (1960); *Fay v. New York*, 332 U.S. 261 (1947).

It is therefore ORDERED that the plaintiffs' objection is OVERRULED.

Very truly yours,

/s/ Bernard Balick
BERNARD BALICK

BB:ipm
cc: Prothonotary

[DELAWARE SUPERIOR COURT CIVIL RULES]

RULE 3. COMMENCEMENT OF ACTION

* * * *

(e) Deposit for Costs. The Prothonotary shall not file any paper or record or docket any proceeding until the required deposit for costs and fees has been made. Before any civil suit, action or other proceeding is instituted in the Superior Court, the Prothonotary shall demand and receive the sum of $40, as a deposit of guaranty for the payment of the fees and costs in his office, and he shall apply the sum of $40 from time to time in payment of such fees and costs in his office, and shall return to the person depositing the same, any balance remaining after such suit, action or other proceeding is completed. If the sum of $40 is expended in the payment of the fees and costs in his office as the fees and costs accrue from time to time, the Prothonotary shall demand and receive a sufficient amount, which shall be necessary, in his judgment, to defray the fees and costs for additional service or services before any such additional service or services shall be performed by him. This Rule shall not apply to any suit, action or other proceeding which is exempted by law from the requirement of a deposit for costs.

A deposit of not less than $750 shall be required in every case where a special jury is requested.

* * * *

RULE 40. ASSIGNMENT OF JUDGE; SPECIAL JURIES; CONTINUANCES

* * * *

(a) Assignment of Judges. The President Judge of the Superior Court is designated Assignment Judge for the Superior Court with authority to assign and designate the several judges who shall hold said courts or either of them in the several counties of the State for any designated period of time or for the hearing of any 1 or more designated causes.

(b) Special Juries. Application for a special jury shall be made at or before the marking of the case for trial. A party who has applied for a special jury may withdraw such application and have the case tried by the general jury, provided that the granting of such withdrawal will not unduly prejudice or inconvenience an opposing party.

(c) Continuance: Absence of Material Witness. Every motion for continuance upon the ground of the absence of or unavailability of a material witness shall be filed as soon as said absence or unavailability becomes known and shall be accompanied by an affidavit on behalf of the party applying therefor, setting forth the facts which he expects to prove by such witness, the efforts made to procure his attendance, and the date when the absence or unavailability of the witness became known. If it be stipulated by the opposite party, that the witness if called would testify as set forth in the affidavit, the Court, in its discretion, may refuse the motion, and under such circumstances, the affidavit may be offered in evidence at the trial.

(Amended, effective Oct. 15, 1980.)

* * * *

RULE 40. ASSIGNMENT OF CASES FOR TRIAL; SPECIAL JURIES; CONTINUANCES

(a) Trial List; Preparation; Classification of Cases; Chronological Listing. Previous to the opening of each term of court, the Prothonotary under the direction of the Court shall prepare a trial list of all cases which are ready for trial or argument at least 10 days before the opening of said term. The cases on the trial list shall be arranged in 4 groups as follows: jury trials; nonjury trials; divorces; and arguments. The cases shall be arranged in each group in the order in which they become ready for trial or argument.

(b) Special Juries. Applications for special juries shall be made at or before the time the trial calendar is made.

Parties who have applied for special juries may have their cases placed on the calendar of cases for trial by the general jury on timely application provided a panel of general jurors is attending the Court before which panel the case may be conveniently tried at that term and provided that the granting of such application will not unduly prejudice or inconvenience the opposing parties.

(c) Calendar: Disposition When Neither Party Appears. In any case in which neither counsel nor the parties are present at the call of the calendar, the case shall be continued by the Court until the next succeeding term. After 2 such continuances, the case shall be removed from the calendar by the Prothonotary and shall not be returned to the calendar except on order of the Court. The provisions of this subparagraph shall not apply to condemnation causes, which shall be tried at the first term they appear upon the trial list, regardless of defendant's appearance, unless continued by consent of all parties or by the Court for cause shown.

(d) Continuance: Absence of Material Witness. Every motion for continuance upon the ground of the absence of or unavailability of a material witness shall be filed as soon as said absence or unavailability becomes known and shall be accompanied by an affidavit on behalf of the party applying therefor, setting forth the facts which he expects to prove by such witness, the efforts made to procure his attendance, and the date when the absence or unavailability of the witness became known. If it be stipulated by the opposite party, that the witness if called would testify as set forth in the affidavit, the Court, in its discretion, may refuse the motion, and under such circumstances, the affidavit may be offered in evidence at the trial.

(Amended, effective June 30, 1954.)

[10 DELAWARE CODE §§ 4541-4543]

SUBCHAPTER II. SPECIAL JURIES

§ 4541. Procedure for obtaining, striking and sumn cial jury.

(a) A special jury for the trial of a cause, shall be ordered by the Court upon the application of either party.

(b) The party applying for the special jury under this section shall give due notice to the opposite party, and to the Prothonotary, of the time and place of striking such jury. At such time and place the Prothonotary, or his deputy, or if the Prothonotary is not indifferent between the parties, then 2 proper persons indifferent between the parties, appointed by the Superior Court, shall attend with a list of 48 indifferent and judicious citizens of the county, qualified to serve as jurors, showing their names and places of abode.

(c) The party applying for the special jury under this section, his agent or attorney, shall first strike out one of the names, and then the opposite party, his agent or attorney, shall strike out another; and so on, until each shall have struck out 12. If the opposite party, or any person on his behalf, shall not attend, or shall refuse to strike, the Prothonotary or his deputy, or the persons appointed to strike the jury, as the case may be, shall strike for the party not attending, or refusing to strike.

(d) After each party shall have struck 12 names under this section, the remaining 24 persons on the list shall be the jury to be returned for the cause. The Prothonotary, or his deputy, or the persons appointed to strike the jury, as the case may be, shall thereupon deliver to the sheriff a certified list of the names of such persons, with their place of abode, as the jurors to be summoned for the cause, annexed to a venire facias com-

manding him to summon them. The sheriff shall, thereupon, summon the persons named, according to the command of the writ, and shall return the list with the venire. (Code 1852, § 2384; Code 1915, § 4274; Code 1935, § 4745; 10 Del. C. 1953, § 4541.)

§ 4542. Impaneling special jury at trial.

At the trial of the cause, a special jury shall be drawn from the list, returned under § 4541 of this title, in the manner provided in this chapter for other cases. In the selection of a special jury, if any of the 24 persons remaining on the list as provided in § 4541 of this title, are unable to sit as jurors, for any reason satisfactory to the Court, the Court may in its discretion limit the challenges by each party to not less than 3. If the panel is reduced, however, to less than 18, the Court shall dismiss the jury, unless the party requesting the special jury waives sufficient of his challenges to permit a jury to be selected. The costs of the special jury so dismissed in such case shall be borne by the party requesting the special jury. (Code 1852, § 2385; Code 1915, § 4275; 35 Del. Laws, c. 226; Code 1935, § 4746; 10 Del. C. 1953, § 4542.)

§ 4543. Expenses.

The party applying for a special jury shall pay the expenses occasioned by the trial of the cause by such special jury, and the same shall not be allowed to him as part of the costs in the case, unless the Court shall, immediately after the trial of the cause, certify upon the record that the cause was proper to be tried by a special jury. The Court, in its discretion, may order payment of the costs of striking and summoning a special jury, or any part thereof, before the trial of the cause wherein such jury is summoned. (Code 1852, § 2386; Code 1915, § 4276; Code 1935, § 4747; 10 Del. C. 1953, § 4543.)

[10 DELAWARE CODE §§ 4501-4512]

§ 4501. Declaration of policy.

It is the policy of the State that all litigants in state courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the county wherein the court convenes. It is further the policy of the State that all citizens shall have the opportunity to be considered for service on grand and petit juries in the courts of the State, and shall have an obligation to serve as jurors when summoned for that purpose. (60 Del. Laws, c. 225, § 2.)

§ 4502. Definitions.

For purposes of this chapter:

(1) "Clerk" and "clerk of the court" shall mean the Prothonotary of each county or any authorized deputy clerk;

(2) "Voter registration lists" shall mean the official records maintained by state or local election officials of persons registered to vote in either the most recent state or the most recent federal general election;

(3) "Lists of actual voters" shall mean the official lists of persons actually voting in either the most recent state or the most recent federal general election;

(4) "Representative district" shall mean current reapportioned representative district;

(5) "Jury wheel" shall include any device or system similar in purpose or function, such as a properly programmed electronic data processing system or device;

(6) "Junior qualification form" shall mean a form prescribed by the Superior Court, which shall

elicit the name, address, age, race, occupation, education, length of residence within the county, prior jury service and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as a juror, is able to read, write, speak and understand the English language, has pending against him any charge for the commission of a state or federal criminal offense punishable by imprisonment for more than 1 year, or has been convicted in any state or federal court of record of a crime punishable by imprisonment for more than 1 year and has not had his civil rights restored by pardon or amnesty. The form shall request, but not require, any other information not inconsistent with this chapter and required by the Superior Court plan in the interests of the sound administration of justice. The form shall also elicit the sworn statement that his responses are true to the best of his knowledge. Notorization shall not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his religion, national origin or economic status is not a prerequisite to his qualification for jury service, that such information need not be furnished if the person finds it objectionable to do so and that information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service;

(7) "Public officer" shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office. (60 Del. Laws, c. 225, § 2.)

§ 4503. Discrimination prohibited.

No citizen shall be excluded from service as a grand or petit juror in the courts of the State on account of

race, color, religion, sex, national origin or economic status. (60 Del. Laws, c. 225, § 2.)

§ 4504. Plan for random jury selection.

(a) The Superior Court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of § 4501 and § 4503 of this title, and that shall otherwise comply with this subchapter. Separate plans may be adopted for each county. The Superior Court may modify a plan at any time.

(b) Among other things, such plan shall:

(1) Use jury commissioners to manage the jury selection process. The Superior Court shall appoint 2 suitable persons, both of whom shall not at any time be of the same political party, in each county to be jury commissioners. Each jury commissioner shall receive compensation to be fixed by the Superior Court plan but not to exceed $1,000 per annum plus reimbursement for travel expense at the rate of 15 cents per mile but not to exceed $500 per annum to be paid by the State Treasurer upon certification by the Court. The jury commissioners shall act under the supervision and control of the President Judge of the Superior Court or such other judge of the Superior Court as this plan may provide.

(2) Specify whether the names of prospective jurors shall be selected from the voter registration lists or the list of actual voters of each county. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by § 4501 and § 4503 of this title.

(3) Specify detailed procedures to be followed by the jury commissioners in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the

random selection of a fair cross section of the persons residing in the county wherein the court convenes. They shall ensure that names of persons residing in each of the representative districts within the county are placed in a master jury wheel; and shall ensure that each representative district within the county is substantially proportionally represented in the master jury wheel for that county. For the purpose of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each representative district or the number of registered voters may be used.

(4) Provides for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at least one half of 1 percent of the total number of persons on the lists used as a source of names for the county; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel. The President Judge of the Superior Court, or such other Superior Court judge as the plan may provide, may order additional names to be placed in the masted jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times, the interval for which shall not exceed 4 years.

(5) Specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the Superior Court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members

thereof and excuse of members thereof would not be inconsistent with § 4501 and § 4503 of this title.

(6) Specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the Superior Court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with § 4501 and § 4503 of this title. This plan shall provide for exemptions of the following persons: (i) Members in active service in the armed forces of the United States; (ii) members of the fire or police departments of the State or subdivision thereof; (iii) public officers in the executive, legislative or judicial branches of the government of the United States or of the State or subdivision thereof, who are actively engaged in the performance of official duties.

(7) Fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the President Judge of the Superior Court, or such other Superior Court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(8) Specify the procedures to be followed by the jury commissioners in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) State and local officials having custody, possession or control of voter registration lists, lists of actual voters or other appropriate records shall make such lists and records available to the jury commissioners for inspection, reproduction and copying at all reasonable times as the commissioners may deem necessary and proper for the performance of duties under this subchapter. The Superior Court shall have jurisdiction upon application by the

Attorney General to compel compliance with this subsection by appropriate process. (60 Del. Laws, c. 225, § 2.)

§ 4505. Drawing of names from the master jury wheel; completion of junor qualification form.

(a) From time to time as directed by the Superior Court, the jury commissioners shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The jury commissioners shall prepare an alphabetical list of the names drawn, which list shall not be disclosed to any person except pursuant to the Superior Court plan and to § 4508 and § 4509 of this title. The jury commissioners shall mail to every person whose name is drawn from the master wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the jury commissioners by mail within 10 days. If the person is unable to fill out the form, another shall do it for him, and shall indicate that he has done so and the reason therefor. In any case in which it appears that there is an omission, ambiguity or error in a form, the jury commissioners shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form to the jury commissioners within 10 days. Any person who fails to return a completed juror qualification form as instructed may be summoned by the jury commissioners forthwith to appear before the jury commissioners to fill out a juror qualification form. A person summoned to appear because of failure to return a juror qualification form as instructed who personally appears and executes a juror qualification form before the jury commissioners may, at the discretion of the Superior Court, except where his prior failure to execute and mail such form was wilful, be entitled to receive for such appearance the same fees and travel allowances paid to jurors under § 4511 of this title. At the time of his appearance for jury service, any person may be required to fill out another juror qualification form in the presence of the jury commissioners,

at which time, in each case as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form. Any information thus acquired by the jury commissioners may be noted on the juror qualification form and transmitted to the President Judge or such Superior Court Judge as the plan may provide.

(b) Any person summoned pursuant to subsection (a) of this section who fails to appear as directed shall be ordered by the Superior Court forthwith to appear and show cause for his failure to comply with the summons. Any person who fails to appear pursuant to such order or who fails to show good cause for noncompliance with the summons may be fined not more than $100 or imprisoned not more than 3 days, or both. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than 3 days, or both. (60 Del. Laws, c. 225, § 2.)

§ 4506. Qualifications for jury service.

(a) The President Judge of the Superior Court, or such other Superior Court judge as the plan may provide, on his initiative or upon recommendation of the jury commissioners, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The jury commissioners shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the President Judge of the Superior Court, or such other Superior Court Judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the Superior Court unless he:

(1) Is not a citizen of the United States 18 years old who has resided for a period of 1 year within the county;

(2) Is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) Is unable to speak the English language;

(4) Is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; provided, however, that no person shall be deemed incapable solely because of loss of sight in any degree; or

(5) Has a charge pending against him for the commission of, or has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than 1 year and his civil rights have not been restored by pardon or amnesty. (60 Del. Laws, c. 225, § 2; 62 Del. Laws, c. 219, § 1.)

§ 4507. Selection and summoning of jury panels.

(a) The jury commissioners shall maintain a qualified jury wheel and shall place in such wheel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the Superior Court plan. From time to time, the jury commissioners shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury commissioners shall prepare a separate list of names of persons assigned to each grand and petit jury panel.

(b) When the court orders a grand or petit jury to be drawn, the jury commissioners or their duly designated deputies shall issue summonses for the required number of jurors. Each person drawn for jury service may be served personally, or by registered or certified mail ad-

dressed to such person at his usual residence or business address. If such service is made personally, the summons shall be delivered by the jury commissioners or their duly designated deputies to the sheriff who shall make such service. If such service is made by registered or certified mail, the summons may be served by the jury commissioners or their duly designated deputies who shall make affidavit of service and shall file with such affidavit the addressee's receipt for the registered or certified summons. If such service is made by the sheriff, he shall attach to his return the addressee's receipt for the registered or certified mail.

(c) Except as provided in § 4506 of this title or in any jury selection plan provision adopted pursuant to paragraph (5) or (6) of § 4504(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors; provided, that any person summoned for jury service may be:

(1) Excused by the court, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessaary, at the conclusion of which such person shall be summoned again for jury service under subsections (b) and (c) of this section; or

(2) Excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings; or

(3) Excluded upon peremptory challenge as provided by law; or

(4) Excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown; or

(5) Excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

No person shall be excluded under paragraph (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with § 4501 and § 4503 of this title. The number of persons excluded under paragraph (5) of this subsection shall not exceed 1 percent of the number of persons who return executed jury qualification forms during the period, specified in the plan, between 2 consecutive fillings of the master jury wheel. Exclusions effectuated under paragraph (5) of this subsection shall not be subject to challenge under this chapter. Any person excluded from a particular jury under paragraphs (2), (3) or (4) of this subsection shall be eligible to sit on another jury if the basis for his initial exclusion would not be relevant to his ability to serve on such other jury.

(d) Whenever a person is disqualified, excused, exempt or excluded from jury service, the jury commissioners shall note in the space provided on his juror qualification form or on the juror's card drawn from the qualified jury wheel the specific reason therefor.

(e) In any 2-year period, no person shall be required to:

(1) Serve or attend court for prospective service as a petit juror for a total of more than 30 days, except when necessary to complete service in a particular case;

(2) Serve on more than 1 grand jury; or

(3) Serve as both a grand and petit juror.

(f) When there is an unanticipated shortage of available petit jurors drawn from the qualified jury wheel, the court may require the sheriff to summon a sufficient number of petit jurors selected at random from the voter registration lists, lists of actual voters, or other lists specified in the plan, in a manner ordered by the court consistent with § 4501 and § 4503 of this title.

(g) Any person summoned for jury service who fails to appear as directed shall be ordered by the Superior Court to appear forthwith and show cause for his failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than 3 days, or both. (60 Del. Laws, c. 225, § 2.)

§ 4508. Challenging compliance with selection procedures.

(a) In criminal cases, before the voir dire examination begins, or within 7 days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with this subchapter in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within 7 days after the Attorney General discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with this subchapter in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within 7 days after the party discovered or could have discovered, by the exercise of dilegence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with this subchapter in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b) or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with this subchapter, the moving party shall be entitled to present in support of such motion the testimony of the jury commissioners, if available, any relevant records and papers not public or otherwise available

used by the jury commissioners and any other relevant evidence. If the court determines that there has been a substantial failure to comply with this subchapter in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this subchapter or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with this subchapter in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this subchapter.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a crime, the Attorney General or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with this subchapter. Nothing inthis section shall preclude any person or the State from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commissioners in connection with the jury selection process shall not be disclosed, except pursuant to the Superior Court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b) or (c) of this section, until the master jury wheel has been emptied and refilled pursuant to § 4504(b)(4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than 1 year, or both. (60 Del. Laws, c. 225, § 2.)

§ 4509. Maintenance and inspection of records.

After the master jury wheel is emptied and refilled pursuant to § 4504(b)(4) of this title, and after all persons selected to serve as jurors before the master wheel was emptied have completed such service, all records and papers compiled and maintained by the jury commissioners before the master wheel was emptied shall be preserved in the custody of the clerk for 4 years or for such longer period as may be ordered by a court, and shall be available for public inspection for the purpose of determining the validity of the selection of any jury. (60 Del. Laws, c. 225, § 2.)

§ 4510. Challenges.

In civil cases, each party shall be entitled to 3 peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court. (60 Del. Laws, c. 223, § 2.)

§ 4511. Fees.

Grand, petit or special jurors shall receive $15 per day plus reimbursement for travel expenses at the rate of 15 cents per mile. The clerk of the court shall keep a record of attendance and trav[illegible] expense and shall certify the amount due each juror for payment by the State Treasurer. Whenever a jury is furnished with actual necessaries during their confinement in the jury room or elsewhere, the expense shall be paid by the State Treasurer upon certification by the court. (60 Del. Laws, c. 225, § 2.)

§ 4512. Jurisdiction.

The Superior Court shall have original and exclusive jurisdiction over any violation of this subchapter. (60 Del. Laws, c. 225, § 2.)

Supreme Court, U.S.
FILED
JAN 20 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1053

IN THE

Supreme Court of the United States

October Term, 1982

LILLIAN M. HAAS, Personal Representative of the Estate of and Parent and Next of Kin of John V. Cataldi, Deceased; CHERYL RUFF, Personal Representative of the Estate of and Widow of and Next of Kin of Edwin J. Ruff, Jr., Deceased; BETTY LOU SCHLECTIC BAHE, as Guardian and Next Friend of Ginger Schlectic, Minor Child of Ralph C. Schlectic, Deceased, and JULIA KATHLEEN McDONALD LAMASCUS, Personal Representative of the Estate of and Widow of and Next of Kin of Mark Lamascus, Deceased; and JULIA KATHLEEN McDONALD LAMASCUS as Guardian and Next Friend of Sarah Laine Lamascus and Mark David Lamascus, Minor Children of Mark Lamascus, Deceased,

Appellants,

v.

UNITED TECHNOLOGIES CORPORATION, a Delaware Corporation,

Appellee.

On Appeal From the Supreme Court of Delaware

MOTION TO DISMISS OR AFFIRM AND APPENDIX

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QUESTIONS PRESENTED BY THE APPEAL

I. Should this Court overrule its own well-established decisions holding that the states are empowered to establish their own procedures, including special jury procedures, for selecting and impaneling juries in state court civil trials?

II. Should this Court consider the "potential" that a special jury procedure may be abused, or used in a case when it is not appropriate, although those questions do not arise in this case where the procedures were not abused, and where a directed verdict was appropriate, and the case was, as conceded by appellants, a special case appropriate for trial before a special jury?

III. Should this Court consider the alleged issues in this case where no adequate record was made by appellants to present the issues and appellants never complained about a special jury at trial or in their appeal to the Delaware Supreme Court?

IV. Should this Court consider the validity of rules which caused no abuse of appellants' rights and which rules will soon be superseded?

V. Was this appeal taken in conformity with the United States Supreme Court Rules?

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The Appellee, United Technologies Corporation ("United Technologies"),* moves the Court to dismiss the appeal herein on the grounds that it does not present a substantial federal question, that appellants did not properly raise the issues on which the appeal is based in the courts below, that the judgment rests on an adequate non-federal basis and that the appeal was not taken in conformity with the United States Supreme Court Rules. In the alternative, United Technologies moves the Court to affirm the judgment of the Supreme Court of Delaware on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

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* United Technologies has no parent companies. It has no domestic affiliates and no domestic subsidiaries not wholly owned by United Technologies. Its only foreign affiliates and subsidiaries are Pratt & Whitney Aircraft of Canada, Hamilton Standard Stork, B. V., Hamilton Standard Ltd., Precilec S. A., Ratier-Forest-G. S. P., Societe Nationale des Etudes et de Construction de Moteurs d'Aviacion and S. P. Elettronita, S. p. A.

STATEMENT OF THE CASE

"Red Blade BIM Black Again, Again & Again!" (Written statement on maintenance records the morning before the helicopter took off on its fatal flight). Appendix to Appellee's Motion to Dismiss or Affirm at 1b; 2b-3b; 4b (hereinafter cited by reference to the page).

"If there has been a loss of spar pressure the blade must be replaced." (Statement in Maintenance Manual). 5b; 6b; 7b-8b.

"We had just missed it." 9b (Major Steward).

A. The Underlying Claim

The appellants' decedents in this case were killed as the result of a crash on January 8, 1975 of a Sikorsky CH-53 helicopter manufactured five years before the crash by appellee, United Technologies, and owned, operated and maintained by the military during that five years. The crash resulted from the fracture of one of the six main rotary blades of the helicopter. The unrebutted evidence in this case established that it is not possible to design and manufacture a rotary blade which may not eventually crack after prolonged usage. 10b, 11b. Therefore, the helicopter was equipped with a warning system known as a "BIM" (an acronym for "Blade Inspection Method") which turned from white to black when the pressure of the nitrogen, with which the blade was filled, was reduced by leakage through an incipient crack. The testimony established, obviously to the jury's satisfaction, that the warning system in this case performed as designed and gave repeated warnings on at least four successive days before the date of the fatal flight (January 4, 5, 6, and 7) that a failure of the rotary blade would occur, alerting the maintenance crew and the flight crew, both of whom had each warning brought to their attention, of the urgent necessity of replacing the blade.

The morning before the helicopter took off on its fatal flight the stark dramatic warning in the first quotation above appeared on the maintenance records.

The authorized procedure in the event of a warning from the BIM and a loss of pressure, as occurred on each occasion in this case, according to the evidence, was to remove the blade and replace it with a new one. Maintenance personnel failed to respond to the warnings in accordance with the manufacturer's instructions with which they were familiar from the appropriate service manuals (see second quotation above), and instead of removing the blade, the military took the easy step of merely pumping the blade back up with nitrogen despite the obvious danger. Their defective response was documented by the unchallenged written maintenance records. Subsequent investigations of the accident by the Marines and by the Navy found the cause of the crash to be this negligent performance of their duties by maintenance personnel, together with a failure by the captain and his crew to take indicated precautionary steps. 12b-25b; 26b-29b. The head of maintenance at the airbase bluntly admitted: "We had just missed it." 9b. No blame was attributed to the manufacturer, United Technologies. Obviously the jury concurred with the self-critical findings by the military investigating bodies. They rejected the contention that a second, redundant warning system was reasonably necessary, since the long crack propagation time furnished an adequate warning between flights (as it had in this case) when the helicopter was on the ground and could be repaired.

At the trial, appellants' own expert, Cunitz, testified that the real cause of the crash was the failure to detect the crack in time. 30b. But only the military maintenance personnel, not United Technologies, could have discovered the cracked blade in this case in time to remove or repair

it. Appellants' own witness Goldberg conceded the accident would not have happened if the military had responded to the black BIM and removed the blade. 31b. Those maintenance personnel were responsible for the repair and overhaul of this aircraft, and they had the last opportunity to prevent it. United Technologies had no such opportunity. Furthermore, had the pilot, Ruff, refused to fly in the face of these repeated warnings, or had Ruff, Schlectic or Cataldi followed the instructions they received for a run-up and shut-down and further check, this crash would not have occurred. They had that opportunity to prevent the crash, but United Technologies did not.

B. Selection of the Special Jury

The appellants made no adequate record in this case relating to the process of selecting this jury. There is no evidence whatsoever to show that the jury pool, from which the panel was selected, was "heavily skewed in favor of white, middle-aged, well-educated, economically secure males." Appellants' Jurisdictional Statement (hereinafter "AJS") at 9. Indeed, this is not true even of the jury panel itself (as distinguished from the jury pool) which, among its twelve jurors and six alternates, originally included five women (AJS Appendix at 103a) (hereinafter cited by reference to the page), and would have included more had not the appellants themselves challenged two women (and one woman was excused by the Judge). Even the panel included a juror without a high school education (118a), jurors without college degrees (118a), a non-white (118a) and females (118a). There is no record of the economic status of the jurors (118a).[1]

1. We find no support in the record for appellants' statement at AJS 9 that "only one person in 263 did not have a high school education." Evidently the figure of 263 is the total number in the

While it is true that the Court administrator's affidavit, which was not obtained and filed until after the trial was over, states that the jury commissioners had excluded persons having twelve years or less of formal education or persons who were under the age of thirty or over the age of seventy, the record here shows that there were persons in the jury pool who were under the age of thirty or over the age of seventy, and it was not established when they were drawn. In any event, it is clear that age and education are perfectly valid criteria for a state to utilize. *See infra.*

Appellants at AJS 10 n. 5 complain that the decision in this case was rendered by a jury that was 84% male, consisting of ten (10) men and two (2) women. However, appellants overlook the fact that it is the jury pool that is important in a case of this kind, not the actual jury panel, which may vary in composition solely as a result of the luck of the draw or challenges (in this case appellants challenged two (2) women). This disparity did not exist in the jury pool.[2]

C. Decisions of the Courts Below

1. The Trial Court Opinion Upholding the Special Jury Practice.

Appellants seem to complain that the lower court held that 10 *Del. C.* §§ 4501 *et seq.* (1982 Cum. Supp.)

1. (Cont'd.)

pool, while the figure of one represents the number on the *panel*. Appellants cite as authority in the record mere contentions in their motion in the court below. *See, e.g.*, AJS at 9, with references to 118a.

2. Throughout their jurisdictional statement appellants fail to distinguish between the jury pool, from which the panel was drawn, the complete jury panel which included the six alternates (and included five women, see 103a), and the twelve jurors who ultimately decided this case.

were inapplicable to special jurors and they state that no reason was given for this decision by the Delaware Superior Court. The statute itself makes it crystal clear that those provisions, which are under a specific heading relating to grand and petit jurors, are inapplicable to the special jury, which is under a separate heading and which clearly proceeds on a different theory.[3]

2. The Delaware Supreme Court Opinions in the Case at Bar.

We have discussed in a separate section the issue of whether or not this Court should consider the "potential" of a special jury statute for discrimination in connection with its review of a case where there was no finding of such discrimination, nor any evidence to support discrimination. The Delaware Supreme Court found that appellants in this case had been treated fairly, but found the court rules could be improved to make sure that future litigants were also treated fairly.

It is significant that while there were two opinions of the Delaware Supreme Court in this case, neither of them sought to reverse the case on any issue pertinent to this appeal. The first opinion proposed reversal on the grounds of an allegedly defective instruction to the jury,

3. It is not correct (as alleged at AJS 11) that the lower court gave no reason for holding 10 *Del. C.* §§ 4501 *et seq.* (1982 Cum. Supp.) inapplicable to special jurors. It noted the obvious fact that grand juries and petit juries on the one hand and special juries on the other are covered in entirely separate subchapters of the statute, namely I and II of Chapter 45 of Title 10 of the Delaware Code. 102a. The Delaware Supreme Court stated that:

> The legislative revision left untouched the provisions of the Special Jury Statute, and we are satisfied that the Legislature intended to preserve the special jury practice when it did not repeal statutory authority for it at the time.

76a.

and it was that particular aspect of the case that, on reconsideration in its second opinion, the Supreme Court of Delaware rejected.[4]

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4. Appellants at AJS 8 n. 2 make some kind of a point of the fact that the Delaware Supreme Court opinion states that appellee cross-appealed from a denial of its motion for a directed verdict, and this was erroneous. Apparently the court was using "cross-appeal" in the sense that appellee did and still does contend that it was error to deny its motion for a directed verdict, and therefore appellants' objections to the instructions and to the special jury were moot. Of course, it is unnecessary for a defendant, as the prevailing party and the appellee, to cross-appeal. Even without any such cross-appeal, appellee may urge any argument in support of the judgment of the court below. *Dandridge v. Williams*, 397 U. S. 471, 475 n. 6, *rehearing denied*, 398 U. S. 914 (1970); *Langnes v. Green*, 282 U. S. 531, 538 (1931); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 567-68 (1931); *United States v. American Railway Express Co.*, 265 U. S. 425, 435-36 (1924); *Annot.*, 1 L. Ed. 2d 1820 at § 4(a) (1957); 5 C. J. S. *Appeal and Error* § 1498a(3) (1958); 5 Am. Jur. 2d *Appeal and Error* § 707 (1962). Delaware appears to hold that a reason for sustaining a judgment, if based on the record sent up, may even be urged for the first time in the appellate court. *Gottlieb v. Heyden Chemical Corp.*, 92 A. 2d 594, 595 (Del. 1952).

In any event, the Delaware Supreme Court did not reach or consider this point. 2a n. 1.

ARGUMENT

This is a case where the evidence clearly justified the jury verdict and, indeed, we submit, would have justified a directed verdict in appellee's favor. Appellants' principal complaint seems to be that in a different type of case it would have been wrong to use a special jury, or the jurors might have been improperly selected. Yet, at the trial in this case appellants in effect conceded that this particular case was a proper case for trial by a special jury.[5]

---

5. In open court at the trial appellants' counsel announced to the jury:

> His Honor, in his opening remarks to you, said that *you are a special jury*, and that has special connotations. *You are a special jury.* You have been selected out of numerous people *because of your special attributes*, and *this is a special case*, and *that's why a special jury was selected.*

32b (emphasis added).

Further, in his closing remarks, counsel for the appellants reemphasized this point:

> This is a very important case. When I started out on December 1st and had the opportunity to address you, I told you that *it was a special case* and that *you were a special jury*, and you know that many were called but only a few were chosen to serve on this jury. I think that is said somewhere in the Bible, "Many were called, but few were chosen." You were chosen as a special jury.
>
> . . . .
>
> We don't know you. I don't know you. You don't know me, except what you've seen in this courtroom. That's a very large burden that you carry, and we know it. But we are here and we are going to put our chest out, and we are going to let you decide this case and let you deal with the issues in this case, let you determine what the truth is and what the right is in this case, as you have sworn to do. I know you will do it, and you will do it well. *You are a good Delaware jury.*

33b (emphasis added).

Further, the evidence did not establish any improper discrimination in the selection of the jury pool in this case, and both lower courts so found. 103a and 75a. There was no finding that the appellants had been "victimized" by any statutory vices, although the Delaware Supreme Court did approve revision of the statute so as to eliminate the possibility that there might be improprieties in other future cases.

In summary, the questions presented here are not substantial, nor are they clearly presented, because in this particular case there is no record showing that the appellants were adversely affected by any of the "potential" problems in the statute, and no showing that even if this statute were amended to require that it be utilized only in the large, complex cases that it would not be utilized in this particular type of case which was very complex and of long duration. Finally, in this particular case the point was moot because a directed verdict should have been granted in favor of appellee because of the overwhelming evidence establishing, as the jury found, that there was no fault on the part of appellee and the accident occurred as a result of deficient maintenance procedures and pilot error.

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5. (Cont'd.)

Appellants seek to have it both ways, an overt endorsement of the special jury and of the composition of this specific jury in open court, and later a covert attack on the special jury system and on the composition of this jury in a motion for a new trial before the same court and on appeal.

I. This Case Presents No Substantial Question Not Previously Decided by This Court.

A. This Court Has Repeatedly Held That State Jury Practices Should Not Be Overturned When Not Clearly Violative of Federal Constitutional Principles.

For over 100 years this Court has consistently held that the states have the power to establish juror qualifications, as it is within the states' authority to regulate procedures used in state courts. *Carter v. Greene County,* 396 U. S. 320, 332 (1970); *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934); *Jugiro v. Brush,* 140 U. S. 291, 297-98 (1891); *Clinton v. Englebrecht,* 80 U. S. (13 Wall.) 434, 448 (1872).

While the seventh amendment "preserves" the right to trial by jury in suits at common law, this Court has not applied that amendment to the state courts, since it is not incorporated into the fourteenth amendment. *Melancon v. McKeithen,* 345 F. Supp. 1025 (E. D. La. 1972), *aff'd sub nom., Hill v. McKeithen,* 409 U. S. 943 (1972) *and aff'd sub nom., Davis v. Edwards,* 409 U. S. 1098 (1973). Thus it has been stated that the states can "modify the civil jury so long as the requirements of due process are observed." Note, *The Case for Special Juries in Complex Civil Litigation,* 89 Yale L. J. 1155, 1157 (1980). Consequently, the states can pass statutes authorizing special juries consisting of persons who may be better qualified to try cases of some complexity. *Cf. Strauder v. West Virginia,* 100 U. S. 303, 310 (1880).

We submit that in view of the well-reasoned decisions in this area holding that state jury selection and impaneling procedures should be left to the states, thus permitting the very desirable experimentation with new

ideas and approaches, this case does not present a substantial question. *Fay v. New York*, 332 U. S. 261, 294-96, *rehearing denied*, 332 U. S. 784 (1947).

Further, in the past when this Court has dealt with the problem of an absence in the statute of specific criteria on which jury selection is based, it has consistently held that such an absence is not a constitutional defect. *Fay v. New York*, 332 U. S. 261, 272, *rehearing denied*, 332 U. S. 784 (1947) ("It has consistently been held that a jury is not rendered constitutionally invalid by the failure of the statute to set forth any standards for selection.") *Akins v. Texas*, 325 U. S. 398, 402-03, *rehearing denied*, 326 U. S. 806 (1945); *Franklin v. South Carolina*, 218 U. S. 161, 167-68 (1910); *Murray v. Louisiana*, 163 U. S. 101, 106, 108 (1896). In any event, this jury pool did provide a fair cross-section of the community, although it was a cross-section of more qualified jurors for this special case. And, in fact, the Supreme Court has never held invalid a state court civil jury trial based on the failure to comply with any sort of "cross-section of the community" standard. Luneberg & Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 Va. L. Rev. 887, 922 (1981).

We have dealt below with the question of whether or not, in a case of this size, duration, and complexity, the appellants can properly complain that the statute should not be available in some other simple, small, short trial.

B. Special Juries Have Already Been Approved by Decisions of This Court.

As the lower court noted, special or blue ribbon jury statutes and practices thereunder have been upheld by this Court even in criminal cases. *Fay v. New York*, 332

U. S. 261, 285, *rehearing denied*, 332 U. S. 784 (1947).[6] This is true notwithstanding the fact that the sixth amendment, relating to criminal prosecutions, has been held to be incorporated in the due process clause of the fourteenth amendment, while the seventh amendment, relating to civil cases (and of course we are involved here with a civil case) has never been held to be so incorporated. *See Peters v. Kiff*, 407 U. S. 493 (1972); *Melancon v. McKeithen*, 345 F. Supp. 1025 (E. D. La. 1972), *aff'd sub nom., Hill v. McKeithen*, 409 U. S. 943 (1972), *and aff'd sub nom., Davis v. Edwards*, 409 U. S. 1098 (1973). Reasons for jury trial in a civil context and a criminal context may be different. *See Colgrove v. Battin*, 413 U. S. 149 (1973).

II. The Issues Appellants Raise Are Not Now Substantial Because They Are Not Presented by This Case.

Appellants' principal complaints in this case seem to relate to situations which might arise in other cases, but which did not arise in this case.

Appellants rely heavily on the fact that the Delaware Supreme Court directed the Superior Court to draft improvements to the special jury statute before using it again because "potentially" it could be used in an improper way. AJS at 19-21. However, there was no finding that it was used improperly in this case, or that there had been any improper exclusion or inclusion of particular categories of jurors. We submit, therefore, that this Court should not consider this case which does not raise the questions about which appellants complain.

Similarly, appellants object at AJS 17 and elsewhere (*see, e.g.*, AJS at 11) to the fact that the Delaware special

6. *See also Moore v. New York*, 333 U. S. 565 (1948); *Brown v. New Jersey*, 175 U. S. 172 (1899). These are similarly *a fortiori* cases involving criminal prosecutions.

jury statute might be available in a simple automobile accident case and that it would be unfair to have a special jury statute which is available when it is not needed.[7] However, that is not a question raised in this case where the jury was confronted with a highly sophisticated battle of experts in the field of aircraft design, warning systems, metallurgy, statistics, etc. Further, this trial was of extremely long duration, commencing on December 1, 1980 and not ending until January 19, 1981, requiring jurors with powerful memories and highly developed retentive abilities. A critical witness for appellants, Tannian, characterized this as an "exceptional case". 34b. About two hundred exhibits were introduced, many of them long and technical. Surely this case would have met any reasonable criterion which could be set up for the use of special juries as appellants conceded in the lower court (see footnote 5, *supra*), and so it does not present the questions which appellants would have this Court review. Indeed, extension of the special jury system to deal with the complexities of modern trials such as this has been urged by scholars writing in this field. *See* Luneburg & Nordenberg, 67 Va. L. Rev. 887, *supra;* Note, 89 Yale L. J., *supra* at 1162 n. 40. Further, special juries may resolve the controversial problem of what to do about cases deemed too complex and/or of too long duration to be presented to a regular jury. *Compare In Re U. S. Financial Securities Litigation*, 609 F. 2d 411 (9th Cir. 1979), *cert. denied sub nom., Gant v. Union Bank*, 446 U. S. 929 (1980), *with In re Japanese Electronic Products Antitrust Litigation*, 631 F. 2d 1069 (3d Cir. 1980).

7. The statute does, in fact, have a very substantial penalty incorporated in it if it is used when inappropriate. Under such circumstances the entire cost of the special jury falls on the person who demanded it even if he is the prevailing party. *See* 10 *Del. C.* § 4543 (1975); AJS at 4.

Appellants suggest at AJS 15 n. 8 that the Delaware Supreme Court approved exclusion of otherwise qualified jurors based "solely on age, occupation, intelligence, and education (minimum of a college degree)." Insofar as age and education are concerned, these are permissible and valid criteria, and are endorsed, in fact, by the authorities who have considered this question. *See* Note, 89 *Yale L. J., supra* at 1174-75. In this case there is no showing that anyone was excluded because of occupation or intelligence. The new Delaware special jury rules, to our knowledge, are not yet available, and, in any event, were not applicable to this case.

III. No Substantial Question Is Presented in This Case Because the Record Below as to the Jury Selection in the Case at Bar Is Inadequate and Insufficient to Support This Appeal and in No Event Does the Record Demonstrate a Denial of Due Process in This Case.

Before trial appellants made virtually no record of any statistical or other data showing any constitutional or statutory defect in the Delaware special jury pool or panel *in this case*. Indeed, appellants registered no complaints about the *way* the procedure worked, though they opposed use of the special jury. Instead, at trial, they openly praised the special jury as a legal body as well as the individual members serving thereon in the instant case. Before trial, appellants were aware of the pool of special jurors, including their ages, education, and occupational backgrounds. This information on each juror in the pool was available in the Prothonotary's office. Appellants failed to make a record as to the jury pool for this case. At the trial, as noted above in footnote 5, appellants openly commended the jury as a special jury, and stated this was a "special case." After the trial—when appel-

lants had lost and were seeking an avenue for appeal—appellants tried to reconstruct the jury pool or panel from which the jurors were selected.

Before trial the parties were permitted to strike some jurors from the pool, in accordance with the Delaware law. Appellants made no record at the time of the strikes of whom was struck or that appellants objected to the procedures for selection or striking jurors.[8] Thus, there is no record for some of the statements by appellants at AJS 9-10. By the time trial began, therefore, the jury pool had been reduced through statutory procedures for strikes so that the pool from which the jury was then drawn was significantly altered from the initial pool before the parties exercised their strikes prior to trial. But there is no sound record even of that pool for this case prior to the statutorily exercised strikes by both parties, to which appellants then made no objection and of which appellants made no record.[9]

On the first day of the trial, the twelve jurors and six alternates were drawn, but the composition of the jury was not constitutionally defective. As the jury was drawn on the first day of trial, each party had statutory rights to object to a certain number of jurors. The result of these numerous steps produced the jury of which appellants complain (AJS at 10 n. 5). But the Court does not have a record of the steps: there is no record

8. The statement at the top of AJS 10 concerning appellee's use of the strikes is not supported by the record and no record reference is given.

9. Appellants note at AJS 9 n. 4 that although the special jury statute, 10 *Del. C.* § 4541 (1975), directs the "Prothonotary, or his deputy" to prepare the list of special jurors, the exclusion decisions were made by the jury commissioners who are nowhere mentioned in the statute. There is no showing of prejudice if such a development occurred. Further, this point was never presented to the Delaware courts and preserved.

of the jurors' profiles comprising the initial jury pool and there is no record of who was struck on the days preceding trial when each party exercised statutory rights to strike a number of jurors from the pool from which the Prothonotary would call jurors to appear on the first day of trial.

It is the composition of the initial pool of special jurors *for this case* prior to trial that is the crucial element of appellants' appeal—and there is no record on this point. The after-the-fact—or after-the-trial—attempts of appellants to guess at a possible jury pool through hearsay and sketchy statements of a court clerk do not establish the jury pool in this case. Appellants' counsel's own hearsay data does not establish facts in this case as to the jury. 114a. Even appellants' own data does not establish any constitutional defect. Indeed, that data indicates that the Delaware special jury procedures are infrequently used. See 123a indicating only four special jury trials in 1979 and 124a indicating only two in 1980. Presumably, the Delaware procedure has been used largely in complex or long civil cases, such as the one at bar. Of course, there is no reliable record on that point, either.

Further, while appellants purport to give statistics on the number of women in the general population, they offer no statistics on the number of women who are registered voters and available as qualified jurors, so there is a totally inadequate record on this question. This deficiency was noted by the lower court in its opinion denying the motion for a new trial. 103a. Absent adequate proof, there is a presumption that state officials are performing their tasks in accordance with the precepts of the law. *Hoyt v. Florida*, 368 U. S. 57, 68-69 (1961).

As to age, there is not even an adequate record for appellants to argue that people under thirty years of age were not represented in the pool of special jurors. There

is no record as to the ages of the special jurors on the list that comprised the pool. 35b-38b. Appellants filed the questionnaires of the twelve special jurors who actually tried this case, but the relevant statistics, as we have noted, must be for the entire pool of special jurors, not just the twelve who by chance were drawn for the trial. Questionnaires from the pool do show jurors under thirty at the time of the trial (Sandra Colarecchi (age 25), Susan Kreuer (age 25), R. A. Marin (age 27), Robert R. Miller (age 25) and Michael Vayo (age 28)). 39b-53b.

Furthermore, appellants did not raise the age question at all in the Superior Court, and this explains in part their inadequate record.

Finally, the record is totally devoid of any suggestion of the systematic exclusion of any group which should not be excluded (*see Apodaca v. Oregon*, 406 U. S. 404, 413 (1972); *Thiel v. Southern Pacific Company*, 328 U. S. 217, 220 (1946)) or purposeful exclusion of any such group. *City of Mobile v. Bolden*, 446 U. S. 55, 77 n. 24 (1980); *Akins v. Texas*, 325 U. S. 398, 403, *rehearing denied*, 326 U. S. 806 (1945); *Taylor v. Louisiana*, 419 U. S. 522, 538 (1975); *Cassell v. Texas*, 339 U. S. 282, 289-90 (1950); *Neal v. Delaware*, 103 U. S. 370, 394 (1881). Without such a record, as the Delaware Supreme Court noted at 75a, appellants "have not established that the special jury statute, as applied in this case, was in violation of their constitutional rights."

Appellee knows of no jury case where this Court has addressed a challenge to the composition of a jury with such an inadequate record as in this case. *Compare Castaneda v. Partida*, 430 U. S. 482, 486-92 (1977); *Carter v. Greene County*, 396 U. S. 320, 324 (1970); and *Fay v. New York*, 332 U. S. 261, 273-76, *rehearing denied*, 332 U. S. 784 (1947), *with* the record in this case.

Based on the record in this case, what rationale could support a decision for appellants? Would the Court disrupt our entire federal-state judicial balance by holding that no state may pass a statute permitting better qualified citizens to serve as jurors? If the appellants argue that the composition of the initial pool of jurors was unconstitutional, the appellants have no record of the initial pool in this case. The subsequent steps under the Delaware statute to permit the parties to reduce this pool by strikes prior to trial cannot be attacked in this case, as there is no record of jurors struck prior to trial. Furthermore, this Court has upheld the right of parties arbitrarily to exercise their statutory rights to strike or exclude jurors. *Swain v. Alabama,* 380 U. S. 202, 227, *rehearing denied,* 381 U. S. 921 (1965). If appellants challenge the criteria for selection of the jury pool, the appellants have no adequate record of the actual criteria used for the selection of this jury pool.

To the extent that the Delaware Supreme Court has directed the Delaware Superior Court to prepare more specific criteria for the future selection of special jurors, that alone establishes no constitutional defect in this special jury. Indeed, it may only suggest the strength of the federal-state judicial system and the wisdom of leaving some discretion in the states to develop their own jury systems for civil trials.

IV. Any Issue With Respect to the Delaware Rules Relating to Special Juries Has Become or Will Become Moot.

Insofar as there is concern about the contention that the current Delaware rules relating to the impaneling of a special jury may contain a potential future problem in other cases, it is most significant that the Delaware Supreme Court, in its opinion in this case, has directed that

those rules be improved. Therefore, in effect, appellants are asking this Court to examine rules which will be repealed and superseded and become moot long before this Court can decide this case.

In light of the fact that the rules did not cause a problem in this case, but were merely described as having a potential for problems in future cases, it would be a waste of this Court's time and energy to focus on a potential rule deficiency, which rules will be amended before they are next used in Delaware.

V. This Appeal Was Not Taken in Conformity With the United States Supreme Court Rules.

United States Supreme Court Rule 28.4.(c) provides that

> In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion or paper in this Court shall recite that 28 U. S. C. § 2403(b) may be applicable and shall be served upon the Attorney General of the State . . . .

Appellants challenge the constitutionality of the special jury statute of the State of Delaware in their appeal, yet their original pleading—their jurisdictional statement—nowhere recites that 28 U. S. C. § 2403(b) may be applicable, as required by United States Supreme Court Rule 28.4.(c). Likewise, apparently the appellants' jurisdictional statement was not served on the Attorney General of the State of Delaware, as required by United States Supreme Court Rule 28.4.(c).

Appellants having failed to comply with the requirements of this Court's Rules, their appeal should be dismissed.

CONCLUSION

This Court has already (in *Fay v. New York*, 332 U. S. 261, *rehearing denied*, 332 U. S. 784 (1947)) said far better than we can say (although in the context of a criminal sixth amendment case) what the conclusion should be in a case of this kind:

> This Court has long dealt and must continue to deal with these controversies from state courts with self-imposed restraints intended to protect itself and the state against irresponsible exercise of its unappealable power.

332 U. S. at 282.

> The function of this federal court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. No device, whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and the courts are organized to convict. They must be organized to hear, try and determine on the evidence and the law. But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court has always been careful not to so interpret this Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences.

Id. at 294.

> Evolution of the jury continues even now, and many experiments are under way that were strange to the common law. Some states have taken measures to restrict its use, others, where jury service is a hard-

> ship, diminish the required number of jurors . . . Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economical experiments without risk to the rest of the country.

Id. at 296.

For these reasons appellee respectfully submits that the questions upon which this appeal depends are so unsubstantial as not to need further argument, that the appeal does not present a substantial federal question, that appellants did not properly raise the issues on which the appeal is based in the courts below, that the judgment rests on an adequate non-federal basis and that the appeal was not taken in conformity with the United States Supreme Court Rules. Therefore, appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Delaware.

Respectfully submitted,

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Dated: January 20, 1983

ORGANIZATIONAL REGISTER
OPNAV 4790/1 (REV. 1-73)
S/N 0107-770-3022

BUNO	TYPE EQP.	AWM	IN WORK		AWP	
			STARTED	STOPPED	ORDERED	RECEIVED
157958	AHXC					
REPORTED DATE	REPORTED TIME					
5007	1700	Y				
	1715		X			
	1945			X		
5007	1930	COMPLETED				

DISCREPANCY: RED BLADE BIM BLACK AGAIN, AGAIN & AGAIN!

ORIGINATOR

CORRECTIVE ACTION: Replaced Shader Valve.

M/C INITIAL: RK

REGN. NUMBER	SUP PRIORITY
TYPE MAINT. D	W.U.C. 15311
SIDE NO. 16	WORK PRI 1 2 3

DISC C

LOCAL USE: Marquis

43

J.C.N.				QA REC'D YES	QA REC'D NO	C/F RCO'D YES	C/F RCO'D NO
5007	476	121	BIM IND.		X		X

PLAINTIFFS' EVIDENCE (Continued)

(The deposition of T. A. Marquis was read as follows:)

"T. A. Marquis, being previously duly sworn according to law, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CASTLE:

. . . .

MR. CASTLE: Your Honor, at this time I'd like to offer into evidence the MAF forms on this particular helicopter for the period running from December 15, 1974 to January 8, 1975.

BY MR. CASTLE:

Q. "That is what you term or call a completed MAF?"

A. "Yes."

Q. "And in its blank form before it is filled out, I guess, it's a MAF form?"

A. "Yes."

Q. "Where are those forms kept?"

A. "In the shop."

Q. "And that's the shop where you did your work?"

A. "Yes, sir."

Q. "Does your signature appear on that completed MAF form?"

A. "Yes."

Q. "And is that in the box which is marked corrected by?"

A. "Yes."

Q. "Could you tell us what the date of that form is?"

A. "January 7, 1975."

Q. "And how do you determine that that's its date from looking at that document?"

A. "The date on the top."

Q. "You are referring to the upper left-hand corner?"

A. "It's in the left-hand corner. It's also in the right-hand corner. You just can't read it."

. . . .

Q. "Earlier in your testimony, you told us that you received a copy of the VIDs discrepancy or complaint. Does that appear anywhere on that form?"

A. "Yes. It's under discrepancy. The complaint does."

Q. "Could you read that to us?"

A. " 'Red blade BIM black again, again, again.' "

Q. "I guess it's pretty clear to everybody, but does that refer to the CH-53 which we have referred to in this case as Dogma 16?"

A. "Yes."

(Deposition of Timothy J. McCauley read to the jury at this time . . . .)

. . . .

Q. "Were you a Quality Assurance representative for the CH-53 helicopter?"

A. "Yes, I was."

. . . .

Q. "On the morning of January 8, referring to January 8, 1975, can you tell us what you did and what happened concerning the aircraft?"

A. "When I arrived to work Wednesday the eighth, on my desk was the discrepancy on the red blade for black BIM indication on aircraft 16."

Q. "That is Dogma 16?"

A. "That is Dogma 16."

Q. "Who had written that discrepancy?"

A. "It was written by Captain O'Brien."

Q. "Do you recall what that discrepancy said?"

A. "It was—it was written up by Captain O'Brien, and dated for the seventh, for Tuesday. The discrepancy was, 'red blade black BIM again, again, again.' It made me wonder why he wrote 'again, again, again,' because I remembered Monday, it did have a black BIM indicator, and I was associated with the blade again."

NAVAIR 01-230HMA-2-4.2

2-12. ROTARY WING BLADES.

. . . .

WARNING

If black is visible on the indicator, it may be an indication of blade damage that is a flight hazard. The cause of the black indication must be determined. If the indicator is found defective it must be replaced. If there has been a loss of spar pressure the blade must be replaced.

PAUL K. GOLDBERG resumes

CROSS-EXAMINATION

. . . .

Q. I will show you Plaintiffs' Exhibit 16 and ask you if you can identify that as the maintenance manual? And I think I can represent that the Plaintiffs have introduced this with the representation that that was the maintenance manual in effect at the time of the accident.

A. Yes. Maintenance instruction, that's correct.

Q. Now, was there any warning as to what to do with a black BIM in this maintenance manual that you recall?

A. Yes, there were.

Q. Let me see if I can assist you and turn you to Page 2.2. And what is the warning there?

A. It says, "If black is visible on the indicator, it may be an indication of blade damage that is a flight hazard. The cause of the black indication must be determined. If the indicator is found defective, it must be replaced. If there is a loss of spar pressure, the blade must be replaced."

THOMAS P. DIXON, called as a witness on the part and behalf of the Defendants, having been previously duly sworn, testified as follows:

. . . .

Q. . . . . Are you in general familiar with the MIMs, as they are called, the maintenance manuals and the troubleshooting procedures?

A. I am.

Q. We are now talking about the procedure which was in effect at the time of the crash on January 8th, 1975.

I am going to hand you Plaintiffs' Exhibit 16. I am also going to put up on the stand Plaintiffs' Exhibit 20, the troubleshooting procedure.

I want to ask you about a statement that you made earlier in response to a question about the BIM. That statement was, as I recall it, that whenever there was a loss of pressure in the blade, the blade should be removed.

Now, is that in fact the case? First, I want to direct your attention to a warning which appears in the MIMs. Can you locate that? It's on page 2-2, but I think in reassembling the manual, we may have mixed the pages a little bit.

A. I don't see Section 2 in here at all.

Here it is. It's mixed up.

Q. Okay.

A. Yes, I have it.

Q. . . . . Have you found it there?

A. I have.

Q. . . . . Have you located the warning in the MIMs?

A. I have.

Q. Let me see if we can read this together. "Warning: If black is visible on the indicator, it may be an indication of damage that is a flight hazard. The cause of the black indication must be determined. If the indicator

is found defective, it must be replaced. If there has been a loss of spar pressure, the blade must be replaced." Now, is that what you were referring to?

A. Yes.

Q. Or does that appear elsewhere, also?

A. That's the warning I'm referring to. Subsequent areas of the handbook agree with that.

(Major Steward's deposition read . . . .)

. . . .

Q. "Did you reach a conclusion in your own mind that they had not properly followed the procedures to service the three successive black BIMS?"

A. "Well, you see, I felt that we had just missed it, you know. . . ."

ROBERT JESSE CUNITZ, being called as a witness on the part and behalf of the plaintiffs, being duly sworn, was examined and testified as follows:

. . . .

First, if it were possible to design a blade that didn't break, we'd be home free. This never would have happened. It turns out, from what I read, that this is not possible.

THOMAS P. DIXON, called as a witness on the part and behalf of the Defendants, having been previously duly sworn, testified as follows:

. . . .

BY MR. CARPENTER:

Q. . . . . What is metal fatigue?

Q. [sic] There isn't any material, just about, that is a solid, that you can't take, keep applying repeated loads to that, at some time it won't finally crack or fail.

18. Investigation findings

I.

A. Previous aircraft history indicates that the aircraft departed New River on a cross country 3 Jan 1975 to Islip MacArthur NY.

B. Returning from the cross country on 4 Jan 1975, the aircraft landed at McGuire AFB for refueling at which time the crew chief noticed a black bim on the red blade during a turnaround postflight inspection. In an effort to determine the cause of the black bim, the crew chief, suspecting a faulty bim, lossened the blade servicing valve (Schrader valve) to determine if any pressure existed within the blade spar. Upon loosening the Schrader valve, the crew chief heard a "hissing" noise which indicated to him the presence of pressure within the blade spar. Therefore the crew chief reasoned that the bim indicator was bad and not the blade. Believing the blade to be serviceable, the crew chief did not inform the pilots.

C. The aircraft continued to Navy Oceana for a refueling stop, hot refueled, departed Oceana for New River, experienced severe weather, returned to Navy Oceana landing at approximately 1925 local. Although a turnaround portflight inspection was not performed by the crew chief, the copilot did in fact see six white bims at that time with a white lens flashlight.

D. After a weather brief the pilot departed Navy Oceana for New River. After once again experiencing severe weather conditions and poor communications with FSS, the pilot landed at Pitt-Greenville to recheck the weather and inform the squadron and FSS of his position and intentions. No turn around postflight was performed at Pitt-Greenville by any crewmember. 156958 departed

Pitt-Greenville at 2250 for New River. He was unable to circumnavigate the existing weather and diverted to Seymour-Johnson AFB. Upon landing at Seymour-Johnson he was contacted by the squadron and was instructed to ron at Seymour-Johnson. There was no postflight at Seymour-Johnson by either pilots or crew.

E. The following morning, 5 Jan 1975, the pilots did not perform their standard NATOPS preflight. However, the crew chief stated that he performed his daily/preflight as directed by the aircraft commander and did not inform the pilots of the existing black bim because of a previous conversation with the copilot where he learned that the rotor head appeared satisfactory to the copilot at Oceana. This conversation reinforced his belief that the bim and not the blade was faulty.

F. Upon arriving at New River on 5 Jan 1975, the pilots were informed of the black bim on the red blade by the crew chief. It was at this time that the crew chief informed the pilots that he had seen a black bim on the red blade at McGuire AFB on 4 Jan 1975. Pilot confirmed the black bim on postflight inspection. Pilots' VIDs write up stated, "Bim, red blade, showing black." He did not state, "Black bim since McGuire" on VIDs.

G. At approximately 0615 on 6 Jan 1975 a hydraulicsman was informed of the pending gripe on the red blade of 156958. Upon checking the blade with the filling and checking unit (T-10) and finding the Schrader valve slightly loose, safety wire broken, and the pressure in the spar to be zero, the hydraulicsman queried the crew chief and found that the crew chief had lossened the Schrader valve and broken the safety wire at sometime prior to servicing. He did not know it was lossened at McGuire AFB. Therefore, he (the hydraulicsman) assumed that

the zero pressure was due to the lossened Schrader valve and not due to a faulty blade or bim. He then reserviced the blade, re-torqued and safety wired the Schrader valve. He did not perform a soap check because the Schrader valve already was loose. He signed off the MAF by saying, "Serviced blade with nitrogen—checked good." He did not state, "Found Schrader valve loose and safety wire broken."

H. On the afternoon of 6 Jan 1975, 156958 was flown by a different aircraft commander for 2.3 hours. During postflight by pilots and crew it was found to have a black bim on the red blade.

I. A second hydraulicsman checked the blade and found spar pressure to be zero. The hydraulicsman informed his work center supervisor of a suspected bim problem and the blade was reserviced and allowed to stand static overnight and did not perform the soap check because he felt the static overnight check would give same indication as soap check.

J. Upon inspection on the night of 6 Jan 1975 and reinspection on the morning of 7 Jan 1975, verifying a white bim indication, the aircraft was signed off and certified "Up" for flight. The same HAC who flew 156958 on 6 Jan 1975 again flew the aircraft on 7 Jan 1975, for 4.8 hours.

K. During a postflight inspection on 7 Jan 1975 a black bim was again found on the red blade and the aircraft was again placed into a "down" status.

L. A third hydraulicsman checked pressure of the spar, found zero pressure, changed the Schrader valve as a corrective action as directed by his acting work center supervisor. The blade was allowed to stand static overnight, inspected for white bim indication, signed off, and

certified for flight. At this time, Tuesday night, trend analysis, QA, failed to detect three recurring bim discrepancies.

M. On the morning of 8 Jan 1975 156958 was daily/preflighted by the chief. While signing off the aircraft, the crew chief learned that it was to be flown by a NATOPS evaluator and a crew chief under instruction and turned the aircraft over to the new crewmembers.

N. It was not until this time, Wednesday morning, that the QA detected three bim discrepancies. While the NATOPS evaluator and crew chief under instruction were coming in to sign off the aircraft after their daily/preflight, they were approached by QA and informed that according to squadron policy, they were required to turn up the aircraft and shut it down to check the red blade bim before flight because of the reoccuring bim discrepancy.

O. After an 0800 AOM (All Officers Meeting) Lieutenants Ruff and Pullen went to preflight 156958. However, it can not be documented that the aircraft was shut down for a bim check prior to flight.

P. 156958 departed New River at 0938, landed at Cherry Point at 0958 for a parts drop. Departed Cherry Point at 1004 and flew direct to Navy Oceana, landing at 1104 for hot refueling. 156958 departed Navy Oceana at 1117 and proceeded direct to McGuire AFB. Att approximately 1204 while cruising at approximately 1500 feet and an airspeed of something less than 130 knots, the red blade failed due to a fatigue crack found on the bottom inboard side of the main rotor blade spar in the vicinity of pocket 14, 13 ft 11 inches from the outboard end of the blade. The classic fatigue striations found at the crack were confirmed by AMB, Naval Safety Center Reps., a NARF North Island metallurist, aand a Sikorsky

blade rep on the scene at the crash site. This fatigue crack is pending engineering investigation. The aircraft immediately experienced catastrophic loss of control and subsequent partial inflight disintergration. 156958 impacted 11 miles east of Salisbury, Md. Weather at the time of the mishap was: 12,000 overcast, wind 150 degrees at 04 knts, and visibility 5 miles. The outboard 13 feet 11 inches of the red blade was found approximately ¾ mile from the wreckage at the 0430 position from the route of flight in a heavy wooded section of a farm. The inflight blade separation and subsequent partial inflight disintergration and impact was seen by numerous witnesses in the vicinity of the crash site. Total elapsed flight time from initial black bim at McGuire AFB to separation was 15.7 hours.

Q. The AMB was assisted by two assigned members of Naval Safety Center who conducted a concurrent mishap investigation at the crash site and at the parent unit, utilizing free exchange of information as directed by US Naval Safety Center.

II. Analysis

A. Ref (181B) crew chief loosening Schrader valve at McGuire AFB to determine if there was pressure within the blade spar was improper maintenance procedure by maintenance SOP. Crew chief failed to inform pilots of existing downing discrepancy.

Б. Ref (181C) the crew chief did not perform a turn around inspection at Navy Oceana. It is the opinion of the AMB that the copilot missed seeing the black bim on the red blade during his rotor head inspection.

C. Ref (181D) no turn around/postflight by any crewmember at Pitt-Greenville. No postflight inspection upon RON at Seymour-Johnson AFB.

D. Ref (181E) pilots violated NATOPS by not performing required preflight. This is the first time pilots should have detected the black bim after departing Islip MacArthur.

E. Ref (181F) pilots did not write up black bim as being black since XcGuire AFB.

F. Ref (181G) due to the requirement for aircraft on the flight schedule of 6 Jan 1975, maintenance control tasked a hydraulicsman to check the blade on 156958 and see if it could hold pressure. The logical course of action for the hydraulicsman after taking to the crew chief was to assume that the loosened Schrader valve was the cause of zero spar pressure. He reserviced the blade, and torqued and safety wired the Schrader valve, all maintenance action was completed and MAF signed off prior to commencement of normal working hours. The hydraulicsman did not state in his MAF write off that he had found a loose Schrader valve and broken safety wire, only that he had reserviced the blade.

G. Ref (181H) with the aircraft in an "Up" status, a daily inspection was performed by the crew chief and when interviewed by the AMB the Monday HAC stated that he himself performed the 10/30 second check on the red blade bim, checked all other bims for proper indication, and found all to be within limits. After flying 2.3 hours a black bim was found on the red blade and 156958 was placed in a "Down" status.

H. Ref (181-I) due to a lack of communication between early crew and day crew, the second hydraulicsman was unaware of the complete procedures followed by the first hydraulicsman. The second hydraulicsman, after taking to his work center supervisor, reasoned that a logical course of action to check for bim or Schrader valve

leakage was to reservice the blade and allow it to stand static overnight and check in the morning for bim or Schrader valve leakage. It is to be noted that no soap test as required by MIMS was performed and zherefore is in violation of standard maintenance procedures. The hydraulicsman felt that the existing below freezing temperatures would preclude the use of the soap test.

I. Ref (181L) the rationale used by hydraulics to change the Schrader valve on the evening of 7 Jan 1975 is undetermined. The procedures and rationale used by the maintenance department after the blade had indicated no loss of pressure from either Schrader valve or bim due to a previous static leakage check for 18 hours (Monday night, 6 Jan 75, through Tuesday morning, 7 Jan 75) should have indicated to the maintenance department that the spar pressure loss was due to either blade spar or blade dam defect and not Schrader valve or bim leakage. Maintenance department failed to properly supervise this third bim discrepancy. Granted, there was a communication gap between day and night crew personnel. However, the maintenance department did infact know that this was the third bim discrepancy, they did infact known that it had been previously static checked overnight to check for pressure loss and should have deduced that replacing the Schrader valve and performing another static overnight blade check for pressure loss would have been redundant maintenance action. Because of a shortage of qualified supervisory personnel available during this time frame, the write up of the third downing bim discrepancy was not noted by QA until the following Wednesday morning. QA at this time instructed both crew members to require that the pilots perform a ground turn-up and shutdown so that QA could personally inspect the red blade bim indicator after shutdown. It is the

opinion of this AMB that due to conflicting testimony by numerous squadron personnel and the time frame involved, that the aircraft was not turned up and shutdown prior to departure on 8 Jan 1975.

J. Ref (181P) it is the opinion of the AMS that the fatigue crack could not have been discovered in a static position as it was on the bottom side of the blade. The normal downward flex of the blade would seal the crack. Therefore the blade would have to be flying for the crack to show spar leakage/deterioration.

III. Conclusions

A. Cause Factor

1. The aircraft accident was due to a fatigue crack of the red blade causing inflight blade separation and subsequent catastrophic loss of control and partial disintergration.

B. Contributing Cause Factors

1. Crew performance

(A). The desire/haste of all cross country crew members to return to NCA led to:

(1) Improper maintenance procedures performed by the crew chief at McGuire AFB i.e. loosening of the Schrader valve and not reporting the black bim to the cross country pilot.

(2) No postflight inspection at Pitt-Greenville. No postflight inspection at Seymour-Johnson AFB the evening of 4 Jan 75.

(3) The daily inspection by the crew chief the morning of 5 Jan 75 that found a black bim discrepancy and again not reporting this to the pilot.

(4) No standard NATOPS preflight by cross country pilots at Seymour-Johnson the morning of 5 January.

(5) The inadequate VIDs write up by the cross country pilot on the bad bim indication.

2. Maintenance procedures

(A). Improper spar pressure integrity check by the crew chief at McGuire AFB.

(B). Failure of maintenance personnel Monday night to perform a soap check in accordance with MIMS and properly write up MAF.

(C). Improper trouble shooting procedures the night of 7 Jan 75 i.e. removal and replacement of the Schrader valve without properly researching all previous downing discrepancies.

3. Supervisory maintenance procedures (see paragraph 2 above)

4. Shortages of adequate numbers of experienced/trained supervisory personnel.

(A). No staff NCO 6055 in hydraulic work center.

(B). No 6119 available for maintenance control supervisory duties.

(C). No adequate cross section representation of required MOS's in QA.

(D) Controlling custodian assigns this squadron twenty-one CH-53's. However, CMC assigns this squadron T/O based on eighteen CH-53's. This further reduces a squadron's operational capability/efficiency.

5. Tempo of operations

(A). Wednesday 8 Jan 75 was originally scheduled to be an aviation standdown.

(B). The squadron's "Can-Do" attitude to provide OP-Ready aircraft to meet scheduled requirements influenced the logical human chain of proper maintenance trouble shooting procedures.

6. Human failure to be over confident in a mechanical system (i.e. the blade) leading to a false sense of security.

C. On Tuesday afternoon 7 Jan 75 the maintenance department was under the impression that because of previously published directives, Wednesday would be a maintenance/avaiation standdown and training day. The maintenance department was geared for a Wednesday work day consisting of aircraft maintenance and training. Therefore, the maintenance department was not expecting to have to meet a flight schedule until publication of the next day's flight schedule by Operations the afternoon of 7 Jan 75. On the evening of 7 Jan 75, four aircraft were still flying. Maintenance then became concerned as to how they would meet the Wednesday AM flight schedule. During this time frame, the maintenance department was staffed by relatively inexperienced junior supervisory personnel. The senior supervisory personnel were preparing for heavy forthcomming deployments not only to Puerto Rico (4A/C), but for a shipboard deployment (2A/C), a possible detachment to Camp Drum, NY (4A/C), and one aircraft to PAR at California. It is ironic that the very program i.e. Maintenance/Aviation standdown and training day that was instiutued to provide the badly needed time for technical training and working off aircraft gripes was rescheduled on several successive days to fill commitments and thus became a contributing part to this mishap. It is the opi ion of this AMB that if the amount of flight hrs and commitments required are to continue at its present level and squadrons are required to operate with their present level of qualified personnel, the system of checks and balances within

the squadrons will continue to break down and the chances of another aircraft accident caused by a similar set of circumstances will continue to exixt.

19. Recommendations

A. That cocxpit bims be incorporated in all Marine CH-53 aircraft.

B. That strict adherence to all NATOPS procedures be followed by all air crewman

C. That strict adherence to all NAMP procedures be followed by all maintenance personnel.

D. Emphasize that all personnel make timely and complete information of all writ ups i.e. VIDs, MAFs, etc.

E. That strict adherence to one full day per week be devoted solely to preventative maintenance/technical training.

F. That formal school training in specific aircraft model, I.S. Sikorsky mini courses, for Fleet Marine Corps personnel be provided for the hard aviation MOS.

G. That a sufficient number of properly trained and experienced personnel in both rank and MOS be provided to properly maintain and operate the 21 aircraft assigned to this squadron.

H. That in conjunction with recommendation G. above, recommend that all critical aviation peculiar MOS be exempted from assignment ot Category "B" billets until sufficient numbers of aviation personnel are available at the squadron level.

I. That the findings of this AMB be given maximum dissemination to all squadrons in an effort to make them aware that such a sequence of events can happen and therefore help to prevent such a reoccurence.

20. Commanding officer's endoresement: I concur with the conclusions and recommendations of the aircraft mishap board with the following comments:

A. Unfortunately it is difficult to legislate two qualities in our personnel. It is virtually impossible to legislate integrity and extremely difficult to legislate against stupidity. Needless to say both were factors in this aircraft mishap. It is inexcuseable that neither pilot performed his duties, but the crew chief also failed, for whatever reason imaginable, to inform the pilots of the downing discrepancy. All three were afforded more that ample time to step forward and tell the truth, but unfortunately none possessed that integrity.

B. Poor management/supervision resulted in the inept handling of the reoccurring black bim downing gripe by maintenance control supervisors and the hydraulics work center.

(1) Maintenance control in conjunction with quality assurance had ample opportunity, if not time, to analize and correct the problem area. The obvious breakdown in communications/supervision connot in total be rationally explained. Regardless of the assumptions/conclusions drawn at this point it is a strange set of circumstances for a squadron that had exceeded sixteen thousand (16,000) accident free flight hours, to have an accident of this nature.

C. The investigation, analysis, and completion of the AAR by this squadron, resulted in a learning process that proved vast and significant. Numerous probled areas were uncovered during the investigation that warrant corrective action, which are totally unrelated to the mishap and when corrected will constitute a hidden benefit. In addition, this adversity has created an emotional impact on this unit that will require months to overcome.

D. The recommendations of the aircraft mishap board are concured with and are amplified in the following paragraphs:

(1) Input of junior personnel marginally qualified within their fields requires technical training programs. Time allowance toward a dedicated program in this area has been seriously limited due to the necessity of addressing continuing work requirements in resopnse to operational commitments.

(2) Insufficient depth of qualified supervisors has limited total effectiveness. Majority of the officers assigned to maintenance do not have formal maintenance schooling nor a maintenance oriented background. Training maintenance officers is accomplished by CJT depending on the needs of the unit. Constant turn overs in supervisory billets by Marines with varying degrees of proficiency degreades the final maintenance product. Presently, those personnel who are qualified supervisors are required to perform functional tasks in addition to teaching OJT, due to low skill levels in their respective work centers. These activities dilute their primary role as a supervisor and degrade the quality of the maintenance effort.

(3) Quality assurance personnel are normally assigned by senority, based on the assumptions that knowledge and experience has been gained on the job. This system has not provided continuity for adequately supervising maintenance procedures nor a continuous flow of qualified personnel.

(4) Training requirement directed by the Commanding General 2DMAW contained in Admin 2DMAW MSG 271515Z Dec 74 (NOTAL) will help correct difficiencies enumerated in the preceding paragraphs.

(5) In the final analysis where all else failed, cockpit bim would have prevented this accident. The helicopter community does not have an egress system, HEPS is years away from being incorporated, if ever and it is high time we as helicopter aicraft commanders had an adequate system to warn of catastrophic failure, and a fair chance of srvival. Strongley recommend that future generation rotor blades, when purchased, have similar reliability/integrity characteristics commensurate with those found in the fixed wing community.

E. The following action has veen initiated to prevent a reoccurrance of a mishap of this nature:

(1). The maintenance chief has been relieved of all associated duties and relocated to maintenance control for continuous supervision and monitoring of all work centers.

(2) A program for assigning a daily maintenance duty officer has been established so that continuity in screening discrepancies maybe assured.

(3) The corrective action for all downing gripes will be reviewed by QA and the squadron safety officer prior to certification of an aircraft as safe for flight.

(4) For the violations that resulted from a lack of knowledge or insufficient training, the appropriate respose is education. For the violations that resulted from a violation of NATOPS procedures, the appropriate resopnse is discipline and they will be dealt with accordingly.

(5) MAG-26 MSG (141938Z Jan 75 NOTAL) and COMNAVAIRSYCOM 102313Z Jan 75 have eliminated the possibility of a breakdown in NAMP procedures as it pertains to the bim indicator system at the CMA level.

(Letterhead of)

DEPARTMENT OF THE NAVY
NAVAL AIR SYSTEMS COMMAND
NAVAL PLANT REPRESENTATIVE OFFICE
SIKORSKY AIRCRAFT DIVISION
UNITED AIRCRAFT CORPORATION
STRATFORD, CONNECTICUT 06457

IN REPLY REFER TO:
QAV/fdb
13052
15 January 1975

From: Naval Plant Representative, Stratford, Connecticut

To: Sikorsky Aircraft

Subj: Interim Safety Suppl TO 1H-53(H) B-6WC-2SS-1 dtd 14 Jan 75

Encl: (1) Dir Mat Mgt Robins AFB GA msg R 142150Z Jan 75

1. The enclosed directive establishes mandatory requirements for actions by the contractor, including the immediate recording of status entries in the applicable section of aircraft logbooks, component cards, maintenance, inspection and/or flight records documents, for all effected articles and/or equipments.

2. This directive constitutes the authority for contractor implementing actions to accomplish the specific requirements of application, compliance, detail instructions, documentation and records, preparation and submittal of special reports.

3. In accordance with compliance requirements of the subject directive, accomplishment must occur *Each pre-flight* - .

☐ Failure to comply with the above deadline will require the withdrawal of all effected articles or equipments from further utilization or service.

4. If costs to the government will result, this office should be contacted immediately and contractual arrangements will be made in order not to delay the work.

5. Update manuals cited in enclosure (1).

/s/ WILLIAM R. KRONUS
William R. Kronus
Administrative Contracting Officer

cc: Q.C. Directive Control (10)
with encl.—Action
Engineering (5)
Contract Pricing (2)
Product Support (2)
O & R
G.F.E.
Tech. Pub.
Tech. Directives
Programs
Foreign License

This is Interim Safety Supplement to 1H-53(H) B-6WC-2SS-1 dated 14 Jan 75. This ITO supplements to 1H-53(H)B-6WC-2 dated 1 Feb 74. Subject: Work cards, preflight-postflight inspection CH/HH-53B/C Helicopters. A suitable reference will be made on the title page of affected to and on the affected work card at the affected paragraph. Purpose: To include a requirement to check main rotor blade bim indicator for proper operation on each preflight. Card number 1-005 Item number 5 is change to read: 5. Blade pressure indicators for proper operation (599). A. Firmly press lever on side oof indicator. Indicator should show half white and half black in 10 to 30 seconds. B. Release lever. Indicator should return to full white indication. Action addresses are requested to make appropriate dissemination to all affected activities under their administrative jurisdiction. Request all affected activities acknowledge receipt and understanding by return MSG : Dir MAT MGT Robins AFB GA/HMAT. Initiator: M. Griffin, Extension 2878, Home Phone 912-987-2395: Alternate, H. Hughes, Extension 2878, Home Phone 912-922-0766. TCTO 1H-53(H)B-6WC-2SS-1 applies.

1. Ref A was first CH-53 accident caused by fatigue crack of main rotor blade (MPB). Refs B and C restricted CH-53 flight envelope and Ref B stated in part, "The ultimate key to safe operation is the bim system and its inspection law appropriate publications. Importance of continuing emphasis to all personnel of these procedures cannot be overstated.

2. Ref D was second CH-53 accident caused by fatigue failure of MRB. NavSafeCen investigation of mishap indicated that several personnel had an opportunity to arrest the chain of events leading to the crash. Further, individual failures to take requisite action could be attributed to very understandable human errors. Breakdowns in communication, lack of understanding of the system, lack of training, etc., allowed repeated indications of an impending blade failure to slip through the controls established by maintenance procedure. Strict control and adherence to existing procedure should have interrupted the chain. In order to close the gap on human error Refs E and F have changed maint procedures and have assigned responsibility for more stringent inspection procedures to IMA.

3. It is essential that all personnel involved in H-53 operations understand that the bim indicators must be checked in accordance with appropriate NAVAIR and NATOPS instructions. Improper indications must be attributed to cracked blade spars unless positively proven otherwise.

4. Nine of thirteen known spar cracks were located on bottom side of spar. Ref G advised that gas will not always leak through a fatigue crack on bottom of spar when blades are static or when rotor is turning at 100 percent RPM at flat pitch. Static leak tests and maint turnups are not valid or authorized spar integrity checks.

5. Request dissemination to all H-53 operators.

ROBERT JESSE CUNITZ, being called as a witness on the part and behalf of the plaintiffs, being duly sworn, was examined and testified as follows:

. . . .

The cause, without question, of this accident was a failure to detect a real alarm, a crack in the blade, all right, which eventually ruptured. That was the cause of this accident.

. . . .

A. The cause of this particular accident simply was a failure to detect that the blade was cracked.

PAUL K. GOLDBERG resumes

CROSS-EXAMINATION

. . . .

A. . . . . If this blade were removed the first time that it had a black BIM indication, this accident would have not happened.

December 1, 1980

THE COURT: The plaintiff may address the jury.

MR. INDEN: Thank you, Your Honor.

Ladies and gentlemen, good morning. Actually, good afternoon.

My name is Arthur Inden. I am one of the attorneys representing the plaintiff in this case. . . .

His Honor, in his opening remarks to you, said that you are a special jury, and that has special connotations. You are a special jury. You have been selected out of numerous people because of your special attributes, and this is a special case, and that's why a special jury was selected.

The Plaintiff may address the jury.

MR. INDEN: Thank you, Your Honor. . . .

This is a very important case. When I started out on December 1st and had the opportunity to address you, I hold you that it was a special case and that you were a special jury, and you know that many were called but only a few were chosen to serve on this jury. I think that is said somewhere in the Bible, "Many were called, but few were chosen." You were chosen as a special jury.

. . . .

We don't know you. I don't know you. You don't know me, except what you've seen in this courtroom. That's a very large burden that you carry, and we know it. But we are here and we are going to put our chest out, and and we are going to let you decide this case and let you deal with the issues in this case, let you determine what the truth is and what the right is in this case, as you have sworn to do. I know you will do it, and you will do it well. You are a good Delaware jury.

FRANCIS XAVIER TANNIAN, called as a witness on the part and behalf of the plaintiff, after having been first duly sworn according to law, was examined and testified as follows:

. . . .

Q. . . . . How much time do you spend preparing a case of this kind?

A. A case of this kind, which is an exceptional case, is very burdensome, and I would—I don't know how many hours a case of this particular kind would take, but certainly it would be forty to sixty hours, I would guess, perhaps more.

IN THE
SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CIVIL ACTION No. 1441, 1976

Lillian M. Haas, et al

Plaintiff

vs.

United Technologies Corp., et al

Defendant

SPECIAL JURORS

1. Anderson, Sylvia S., 705 Dorcaster Drive, Wilmington, 19808.
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38. Robinson, John H., 72 Welsh Tract Road, #204, Newark, 19713.
39. Robinson, Richard W., III, 8 Melanie Drive, Melanie Woods, New Castle, 19720.
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41. Scotton, Agnes T., 902 Dallam Road, Newark, 19711.
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50. Toner, William E., 58 Lower Valley Lane, Newark, 19711.
51. Townsend, Louis Arnold, 505 Ruxton Drive, Wilmington, 19809.
52. Truax, David H., 80 Old Farm Road, Newark, 19711.
53. Tush, Wayne S., Box 369, Summit Bridge Road, Middletown, 19709.
54. Vayo, Michael, 114 White Fawn Road, Newark, 19711.
55. Weldin, A. Barbara, 216 Werden Drive, Llangollen Ests., New Castle, 19720.
56. Whaley, Dorsey E., 53 Holly Lane, Newark, 19711.

/s/ GEORGE J. FISHER
Prothonotary

October 14, 1980

cc: B. T. Castle, Esquire
R. M. Layton, Esquire
A. M. Terrell, Jr., Esquire

Colarecchi Sandra
2304 Darley Woods Road
Wilmington, Delaware 19810

SUPERIOR COURT
STATE OF DELAWARE
JUROR QUALIFICATION FORM

Please print or type your answers.
If more space is needed, use other side.

If you are unable to fill out this form, another shall do it for you and shall indicate that he has done so and the reasons therefor.

Any person who fails to return a completed juror qualification form as instructed may be summoned by the jury commissioners forthwith to appear before the jury commissioners to fill out a juror qualification form.

Information with respect to religion, national origin or economic status is not a prerequisite to qualification for jury service. Such information need not be furnished if you find it objectionable to do so.

Information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on your qualification for jury service.

Sandra Colarecchi	Secretary/American Life Insurance
Name	Occupation & Employer
2304 Darley Woods Road	Single
Street Address	Marital Status
Wilmington, Delaware 19810	
City, State, and Zip Code	Spouse's Occupation & Employer
475-8217/428-3967	10 Years
Home & Business Telephone Numbers	Length of Residence in County
221-42-5582	College—Associate Degree
Social Security Number	Level of Education
3/5/54 / 25	White
Date of Birth and Age	Race

1. Are you a citizen of the United States of America? *YES.*

2. Are you able to read, write, speak, and understand the English language? *YES.*

3. Do you have any physical or mental infirmity impairing your capacity to serve as a juror? *NO.*

4. Have you been convicted in a State or Federal court, or is there pending against you a charge for the commission, of a crime punishable by imprisonment for more than one year? *NO.*

5. Are you a member in active service in the armed forces of the United States or the Delaware State Guard? *NO.*

6. Are you a member of the fire or police departments of the State or a subdivision thereof? *NO.*

7. Are you actively engaged in the performance of official duties as a public officer who is either elected to public office or directly appointed by a person elected to public office in the executive, legislative, or judicial branches of the governments of the United States or of the State or a subdivision thereof? *NO.*

8. Have you served as a juror before? *NO.*

9. Do you have a close friend or relative who is a police officer or is employed in the office of the Attorney General or is otherwise employed by a law enforcement agency? *NO.*

10. Do you request excuse from jury service on the basis of any of the grounds listed in the attached sheet? *NO.*

I swear or affirm that the responses in this form are true to the best of my knowledge.

May 1, 1979 SANDRA COLARECCHI

Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than 3 days, or both.

Any person who wilfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than 3 days, or both.

SPACE FOR OFFICIAL USE ONLY Disqualified—Exempt—

Excused—Excluded—

Reasons:

Susan J. Widener
5 Prince Avenue
New Castle, DE 19720

SUPERIOR COURT
STATE OF DELAWARE
JUROR QUALIFICATION FORM

Please print or type your answers.
If more space is needed, use other side.

If you are unable to fill ou this form, another shall do it for you and shall indicate that he has done so and the reasons therefor.

Any person who fails to return a completed juror qualification form as instructed may be summoned by the jury commissioners forthwith to appear before the jury commissioners to fill out a juror qualification form.

Information with respect to religion, national origin or economic status is not a prerequisite to qualification for jury service. Such information need not be furnished if you find it objectionable to do so.

Information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on your qualification for jury service.

Susan Widener Kreuer	Administrative Officer/ State Fire Marshal's Off.
Name	Occupation & Employer
5 Prince Avenue	Married
Street Address	Marital Status
New Castle, DE 19720	Sales Rep. Sears Roebuck
City, State, and Zip Code	Spouse's Occupation & Employer
654-1150/571-3013	25 years
Home & Business Telephone Numbers	Length of Residence in County
221-44-4375	College Grad
Social Security Number	Level of Education
5/27/55 / 25	White
Date of Birth and Age	Race

1. Are you a citizen of the United States of America? *YES.*
2. Are you able to read, write, speak, and understand the English language? *YES.*
3. Do you have any physical or mental infirmity impairing your capacity to serve as a juror? *NO.*
4. Have you been convicted in a State or Federal court, or is there pending against you a charge for the commission, of a crime punishable by imprisonment for more than one year? *NO.*
5. Are you a member in active service in the armed forces of the United States or the Delaware State Guard? *NO.*
6. Are you a member of the fire or police departments of the State or a subdivision thereof? *NO.*
7. Are you actively engaged in the performance of official duties as a public officer who is either elected to public office or directly appointed by a person elected to public office in the executive, legislative, or judicial branches of the governments of the United States or of the State or a subdivision thereof? *NO.*

8. Have you served as a juror before? *NO.*
9. Have you ever been or do you have a close friend or relative who is or was employed in a police department, the office of the Attorney General, or any other law enforcement agency? *YES.* If your answer is yes, please give the person's name, relationship to you, position, and name of agency: At present I am in the employ of a law enforcement agency—State Fire Marshal's Office.
10. Have you ever been or do you have a close friend or relative who is or was employed by an insurance or claims adjustment company? *YES.* If your answer is yes, please give the person's name, relationship to you, position, and name of employer: My work calls for working w/many insurance and claims adjustment companies.
11. Are you a stockholder in an insurance company which issues accident or casualty insurance? *NO.*
12. Do you request excuse from jury service on the basis of any of the grounds listed in the attached sheet? *NO.*

I swear or affirm that the responses in this form are true to the best of my knowledge.

Monday, Sept. 29, 1980 SUSAN WIDENER KREUER

Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than 3 days, or both.

Any person who wilfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than 3 days, or both.

SPACE FOR OFFICIAL USE ONLY Disqualified—Exempt—Excused—Excluded—

Reasons:

Robert A. Marin
108 Sonant Dr.
Newark, DE 19713

SUPERIOR COURT
STATE OF DELAWARE
JUROR QUALIFICATION FORM

Please print or type your answers.
If more space is needed, use other side.

If you are unable to fill ou this form, another shall do it for you and shall indicate that he has done so and the reasons therefor.

Any person who fails to return a completed juror qualification form as instructed may be summoned by the jury commissioners forthwith to appear before the jury commissioners to fill out a juror qualification form.

Information with respect to religion, national origin or economic status is not a prerequisite to qualification for jury service. Such information need not be furnished if you find it objectionable to do so.

Information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on your qualification for jury service.

R. A. Marin	
Name	Occupation & Employer
108 Sonant Dr.	
Street Address	Marital Status
Newark, DE 19713	
City, State, and Zip Code	Spouse's Occupation & Employer
302/774-1326	
Home & Business Telephone Numbers	Length of Residence in County
072-46-7369	
Social Security Number	Level of Education
3-20-53 / 27	
Date of Birth and Age	Race

1. Are you a citizen of the United States of America? *YES.*
2. Are you able to read, write, speak, and understand the English language? *YES.*
3. Do you have any physical or mental infirmity impairing your capacity to serve as a juror? *NO.*
4. Have you been convicted in a State or Federal court, or is there pending against you a charge for the commission, of a crime punishable by imprisonment for more than one year? *NO.*
5. Are you a member in active service in the armed forces of the United States or the Delaware State Guard? *NO.*
6. Are you a member of the fire or police departments of the State or a subdivision thereof? *NO.*
7. Are you actively engaged in the performance of official duties as a public officer who is either elected to public office or directly appointed by a person elected to public office in the executive, legislative,

or judicial branches of the governments of the United States or of the State or a subdivision thereof? *NO.*

8. Have you served as a juror before? *YES.* If your answer is yes, when and where? Wilmington, DE, April 1980.

9. Have you ever been or do you have a close friend or relative who is or was employed in a police department, the office of the Attorney General, or any other law enforcement agency? *NO.*

10. Have you ever been or do you have a close friend or relative who is or was employed by an insurance or claims adjustment company? *NO.*

11. Are you a stockholder in an insurance company which issues accident or casualty insurance? *NO.*

12. Do you request excuse from jury service on the basis of any of the grounds listed in the attached sheet? *YES.* If your answer is yes, explain the ground of your claim: #11, I served as a petit juror this year.

I swear or affirm that the responses in this form are true to the best of my knowledge.

9-24-80 /s/ ROBERT A. MARIN

Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than 3 days, or both.

Any person who wilfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than 3 days, or both.

SPACE FOR OFFICIAL USE ONLY Disqualified—Exempt—
Excused—Excluded—

Reasons:

Miller Robert R.
423 East 35th St.
Wilm., DE. 19802

SUPERIOR COURT
STATE OF DELAWARE
JUROR QUALIFICATION FORM

(Please print or type your answers.)

If you are unable to fill out this form, another shall do it for you and shall indicate that he has done so and the reasons therefore.

Any person who fails to return a completed juror qualification form as instructed may be summoned by the jury commissioners forthwith to appear before the jury commissioners to fill out a juror qualification form.

Information with respect to religion, national origin or economic status is not a prerequisite to qualification for jury service. Such information need not be furnished if you find it objectionable to do so.

Information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on your qualification for jury service.

Robert R. Miller	None
Name	Occupation & Employer
423 East 35th	
Street Address	Marital Status
Wilm., Delaware 19802	
City, State, and Zip Code	Spouse's Occupation & Employer
764261	Born
Home & Business Telephone Numbers	Length of Residence in County
221-40-7326	College
Social Security Number	Level of Education
6-24-54 / 25	Black
Date of Birth and Age	Race

1. Are you a citizen of the United States of America? *YES.*
2. Are you able to read, write, speak, and understand the English language? *YES.*
3. Do you have any physical or mental infirmity impairing your capacity to serve as a juror? *NO.*
4. Have you been convicted in a State or Federal court, or is there pending against you a charge for the commission, of a crime punishable by imprisonment for more than one year? *NO.*
5. Are you a member in active service in the armed forces of the United States or the Delaware State Guard? *NO.*
6. Are you a member of the fire or police departments of the State subdivision thereof? *NO.*
7. Are you actively engaged in the performance of official duties as a public officer who is either elected to public office or directly appointed by a person elected to public office in the executive, legislative,

or judicial branches of the governments of the United States or of the State or a subdivision thereof? *NO.*

8. Have you served as a juror before? *NO.*

9. Do you have a close friend or relative who is a police officer or employed in the office of the Attorney General or is otherwise employed by a law enforcement agency? *YES.* If your answer is yes, please give the person's name, relationship to you, and agency to whom he or she is employed: My mother is a CPA Lina Houston Traffic officer. In City of Wilm., Del.

10. Do you request excuse from jury service on the basis of any of the grounds listed in the attached sheet? *NO.*

I swear or affirm that the responses in this form are true to the best of my knowledge.

9-24-79 ROBERT R. MILLER

Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than 3 days, or both.

Any person who wilfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than 3 days, or both.

SPACE FOR OFFICIAL USE ONLY Disqualified—Exempt—
Excused—Excluded—

Reasons:

Michael F. Vayo
114 White Fawn Road
Newark, DE 19711

SUPERIOR COURT
STATE OF DELAWARE
JUROR QUALIFICATION FORM

Please print or type your answers.
If more space is needed, use other side.

If you are unable to fill out this form, another shall do it for you and shall indicate that he has done so and the reasons therefor.

Any person who fails to return a completed juror qualification form as instructed may be summoned by the jury commissioners forthwith to appear before the jury commissioners to fill out a juror qualification form.

Information with respect to religion, national origin or economic status is not a prerequisite to qualification for jury service. Such information need not be furnished if you find it objectionable to do so.

Information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on your qualification for jury service.

Michael Vayo	F.I. Du Pont Co.
Name	Occupation & Employer
114 White Fawn Rd.	Single until Oct. 2
Street Address	Marital Status
Newark, Del. 19711	
City, State, and Zip Code	Spouse's Occupation & Employer
H-568-2858/W 999-6173	
Home & Business Telephone Numbers	Length of Residence in County
222-38-0758	
Social Security Number	Level of Education
4-23-52 / 28	
Date of Birth and Age	Race

1. Are you a citizen of the United States of America? *YES.*
2. Are you able to read, write, speak, and understand the English language? *YES.*
3. Do you have any physical or mental infirmity impairing your capacity to serve as a juror? *NO.*
4. Have you been convicted in a State or Federal court, or is there pending against you a charge for the commission, of a crime punishable by imprisonment for more than one year? *NO.*
5. Are you a member in active service in the armed forces of the United States or the Delaware State Guard? *NO.*
6. Are you a member of the fire or police departments of the State or a subdivision thereof? *NO.*
7. Are you actively engaged in the performance of official duties as a public officer who is either elected to public office or directly appointed by a person

elected to public office in the executive, legislative, or judicial branches of the governments of the United States or of the State or a subdivision thereof? *NO.*

8. Have you served as a juror before? *NO.*

9. Have you ever been or do you have a close friend or relative who is or was employed in a police department, the office of the Attorney General, or any other law enforcement agency? *NO.*

10. Have you ever been or do you have a close friend or relative who is or was employed by an insurance or claims adjustment company? *NO.*

11. Are you a stockholder in an insurance company which issues accident or casualty insurance? *NO.*

12. Do you request excuse from jury service on the basis of any of the grounds listed in the attached sheet? *NO.*

I swear or affirm that the responses in this form are true to the best of my knowledge.

9-23-80 MICHAEL F. VAYO

Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than 3 days, or both.

Any person who wilfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than 3 days, or both.

SPACE FOR OFFICIAL USE ONLY Disqualified—Exempt—

Excused—Excluded—

Reasons:

Office-Supreme Court, U.S.
FILED
JAN 27 1983
ALEXANDER L. STEVAS,

No. 82-1053

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LILLIAN M. HAAS, Personal Representative of the Estate of and parent and next of kin of John V. Cataldi, deceased; CHERYL RUFF, personal representative of the Estate of and widow of and next of kin of Edwin J. Ruff, Jr., deceased; BETTY LOU SCHLECTIC BAHE, as guardian and next friend of Ginger Schlectic, minor child of Ralph C. Schlectic, deceased; and JULIA KATHLEEN McDONALD LAMASCUS, personal representative of the Estate of and widow of and next of kin of Mark Lamascus, deceased; and JULIA KATHLEEN McDONALD LAMASCUS as guardian and next friend of Sarah Laine Lamascus and Mark David Lamascus, minor children of Mark Lamascus, deceased,

Appellants,

v.

UNITED TECHNOLOGIES CORPORATION, a Delaware corporation,

Appellee.

On Appeal from the Supreme Court of Delaware

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1053

LILLIAN M. HAAS, Personal Representative of the Estate of and parent and next of kin of John V. Cataldi, deceased; CHERYL RUFF, personal representative of the Estate of and widow of and next of kin of Edwin J. Ruff, Jr., deceased; BETTY LOU SCHLECTIC BAHE, as guardian and next friend of Ginger Schlectic, minor child of Ralph C. Schlectic, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS, personal representative of the Estate of and widow of and next of kin of Mark Lamascus, deceased; and JULIA KATHLEEN MCDONALD LAMASCUS as guardian and next friend of Sarah Laine Lamascus and Mark David Lamascus, minor children of Mark Lamascus, deceased,

Appellants,

v.

UNITED TECHNOLOGIES CORPORATION, a Delaware corporation,

Appellee.

On Appeal from the Supreme Court of Delaware

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

ARGUMENT

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL AND THE RECORD BELOW AMPLY DEMONSTRATES APPELLANTS' CONSTITUTIONAL ATTACKS ON THE DELAWARE SPECIAL JURY STATUTE

In their Jurisdictional Statement Appellants presented four related questions for review by this Court: First, are the states constitutionally obliged to provide in civil

jury cases "an impartial jury drawn from a fair cross section of the community," *Thiel v. Southern Pacific Company*, 328 U.S. 217 (1946), as is required in all federal jury trials and in state criminal trials, *Peters v. Kiff*, 407 U.S. 493, 501 (1972)? Second, is the Delaware statute facially invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it is available on demand without regard to case complexity and requires the deliberate and purposeful exclusion of otherwise qualified jurors from the special jury pool? Third, does the Delaware special jury system as applied to this case violate the Due Process and Equal Protection Clauses because the local jury commissioners adopted criteria for special jury service which required the intentional and purposeful exclusion of all persons under 30 and over 70 years of age or who had less than twelve years of formal education? And fourth, was the Delaware Supreme Court's decision ordering prospective relief only but denying relief to these litigants where it had previously found that Delaware special juries are "defense oriented" [1] and, *as applied in this case*, resulted in an "arbitrary," "potentially discriminatory," "statistically suspect" special jury panel,[2] in violation of the Equal Protection Clause? [3]

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[1] *Nance v. Rees*, 161 A.2d 795 (Del. 1960); *Robelen Piano Company v. DiFonzo*, 172 A.2d 568 (Del. 1961).

[2] The Delaware Supreme Court's description of the special jury practice as applied here is tantamount to a finding of a constitutional violation. And, the stated basis for ordering revision of these practices was "to comport with constitutional principles." A 24a.

[3] Equally important, the criteria the Delaware Supreme Court directed the trial court to use to promulgate rules for selection of special jurors themselves are constitutionally infirm because they direct exclusion of otherwise qualified jurors based solely on "age, occupation, intelligence and education (minimum of college degree)." Hence, the so-called prospective relief perpetuates the constitutional infirmities of the "as applied" arguments and does not correct Appellants' facial invalidity contentions.

In its Motion to Dismiss or Affirm dated January 20, 1983, Appellee United Technologies Corporation makes two basic arguments. First, Appellee argues that the questions presented are insubstantial because this Court has never before decided that the Fourteenth Amendment Equal Protection and/or Due Process Clauses require that state civil juries be drawn from a panel free from intentional exclusion and from a fair cross section of the community. Second, Appellee claims that even if (*arguendo*) the questions are substantial, they were not properly raised below and the record here is inadequate to support the appeal. Finally, Appellee attempts to argue the merits of this appeal by making points such as its previously rejected claims that a directed verdict should have been granted and that Appellants somehow "waived" their attack on the special jury.

None of the Appellee's arguments has merit.

A. The Questions Presented Are Substantial Because The Delaware Supreme Court Has Decided Important Questions Of Federal Constitutional Law Which Have Not Been, But Should Be, Settled By This Court And Has Decided Them In A Way That Departs From the Constitutional Norm For Jury Selection

Appellee argues that the questions presented here are not substantial, because this Court has never held invalid a state court civil jury trial based on the failure to comply with the "cross-section-of-the-community" standard as articulated in the *Thiel* and *Peters* cases.[4] With due deference to Appellee, that is precisely why the Appellants' first question *is* substantial. Since it cannot be

[4] Appellee also contends that state jury practices should not be overturned when not clearly violative of federal constitutional principles. We are not sure what purpose the modifier "clearly" serves, but no one disputes that this Court cannot overturn a state trial practice in the absence of a constitutional violation. The issue is whether such violations occurred. Appellee's argument therefore begs the question.

seriously questioned that the Fourteenth Amendment requires that minimum standards of fairness be afforded litigants in state civil jury trials,[5] is it not important to determine whether those minimum standards include the cross-sectionality of the jury panel as required by this Court in *Thiel* and *Peters*? Since this Court has not previously addressed that issue, it should do so now. This is especially so, because the Delaware Supreme Court's handling of this issue has resolved this important constitutional matter in a manner that departs from the constitutional norm for jury selections.

Appellee contends that "special juries have already been approved by decisions of this Court." But this argument begs the question, and only serves to highlight the substantiality of the question before this Court. As noted in Appellants' Jurisdictional Statement, this Court's last pronouncement on the constitutionality of the special jury system occurred some 35 years ago in *Fay v. New York*, 332 U.S. 261 (1947). Within the past three decades, more recent decisions by this Court[6] have severely eroded the constitutional rationale of *Fay*, rendering its continued viability at best suspect and making all the more necessary this Court's review of the questions presented here.

In any case, and as noted in Appellants' Jurisdictional Statement, page 18, n.12, *Fay* is not even controlling. The special jury statute at issue in *Fay* was available only after a judicial determination that such a jury was appropriate for the case before the court. Delaware's special jury, in stark contrast, is available to a litigant

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[5] *Peters v. Kiff*, 407 U.S. 493, 501 (1972) (regardless of the form of proceedings, due process requires impartiality and basic fairness); *Carter v. Jury Commissioners of Greene County*, 396 U.S. 320 (1970); *Maxwell v. Dow*, 176 U.S. 581, 605 (1900); *Walker v. Sauvinet*, 92 U.S. 90 (1876).

[6] *Taylor v. Louisiana*, 419 U.S. 552 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979); *Peters v. Kiff*, 407 U.S. 493 (1972).

on demand without regard to case complexity, and affords the Delaware courts absolutely no discretion to determine in any particular case whether a special jury is appropriate.

B. The Questions Presented Here Were Raised Below And The Record Is Clearly Sufficient To Support This Appeal

Appellee next argues that the Appellants did not raise in the court below the questions herein presented. The argument is specious. First, the Delaware Supreme Court dealt at length with each of the issues raised in its two opinions, *see* A 14a-25a, 38a-49a, 74a-76a and see reported decision at 450 A.2d 1173, 1180-85 (Del. 1982). The Delaware Court did not indicate in either opinion that it considered the questions improperly raised or that there was any so-called "defect" in the record. Indeed, Appellee has misstated the facts: contrary to the statement appearing at pages 14 and 15 of Appellee's brief in support of its motion to dismiss, Appellants moved (without success) before trial for an order from the Delaware trial court prohibiting empaneling of the special jury. 116a-118a.

The record shows that without question Appellants pressed their Fourteenth Amendment objections to the Delaware special jury statute at all relevant stages. A 14a-25a, 38a-49a, 66a-73a, 74a-76a, 102a-103a, 114a-115a, 116a-119a, 120a-122a, 126a.

Appellee's contention that Appellants lack standing to complain of the "on demand" characteristic of the Delaware statute is similarly frivolous. The underlying claims presented in this case are no more complex than the ordinary products liability litigation handled by "non-special" juries in state and federal courts on a daily basis throughout the nation. Indeed, we would submit that this case is no more complicated than an automobile negligence claim. But, even if (*arguendo*) Appellee's

assertions that this case was "complex" are accepted,[7] Appellee's argument does not address, much less answer, the facial invalidity of the "on demand" aspect of the Delaware statute. On what basis can Appellee or anyone else claim that case complexity provides a justification for a special jury statute that is available on demand and without regard to the nature of the action? How can such a statute survive a challenge even under minimal "rational relation" review?[8] *Turner v. Fouche*, 396 U.S. 346, 362 (1970); *Reed v. Reed*, 404 U.S. 71 (1971); *Stanton v. Stanton*, 421 U.S. 7 (1975).

Appellee also suggests that the Delaware Supreme Court's prospective order that criteria of "age, occupation, intelligence, and education (minimum of a college degree)" be used for selection of future special juries is not in issue in this case. This argument misperceives the thrust of Appellants' position. The significance of these criteria is that the Delaware Supreme Court has approved for continued use the intentional and purposeful exclusion of otherwise qualified jurors based solely on age and educational requirements, the very criteria applied in this case. Thus, the Delaware court's prospective relief does not cure the constitutional infirmities complained of here.[9]

---

[7] To support its claim of complexity Appellee declares: "A critical witness for appellants, Tannian, characterized this as an exceptional case" (Appellee's Brief, page 13). Tannian is an economist who testified on the subject of the decedents' lost earnings. It was "exceptional" only because there were four decedents.

[8] Appellants contend that litigants have a fundamental right to a fair and impartial jury selection process and, therefore, strict scrutiny should apply. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973); *Bullock v. Carter*, 405 U.S. 134 (1972). But, even the minimum rationality standard cannot be met by this statute.

[9] Appellants also contend that the statute is invalid on its face because it *per se* is inconsistent with cross-sectionality requirements, excludes qualified "regular" jurors, and is available on demand.

Appellee's claim that Appellants failed to attack the procedure used here is nothing short of an outright misstatement. Even a cursory reference to Appellants' Motion to Prevent Impaneling of Special Jury (116a-119a) so establishes. Appellants further documented their claim and the record through the uncontroverted affidavit of the Court administrator, who stated that the practice used here purposefully and intentionally excluded jurors based on age and education. And, as to Appellee's claim that the record is deficient, the record establishes that Appellants submitted to the Delaware trial court and Delaware Supreme Court the juror questionnaires for the special jury panel drawn in this case. As noted at 115A, these questionnaires are part of the certified record in this case. They were not printed because of their voluminous nature and because the Court administrator's affidavit adequately summarizes them. To repeat, the Delaware Supreme Court does not indicate in either of its opinions that it considered the record deficient, nor did Appellee even make that contention to that court. The contention that the record is insufficient amounts to sophistry.[10]

Appellee's remaining arguments are, at best, frivolous, and, in any case, irrelevant to the jurisdictional questions before this Court at this stage. For instance, the claim that Appellee was entitled to a directed verdict is totally irrelevant and simply absurd. This argument

---

[10] Despite Appellee's arguments to the contrary, the record as to exclusion based on age is likewise uncontroverted. The affidavit of the Court administrator indicates that the jury commissioners intentionally excluded persons over 70 and under 30 from the jury pool after October, 1980. A 121a. The special jury pool here contained some jurors placed in the special jury "box" both before and after October, 1980. The five names mentioned at page 17 of Appellee's argument of persons who were under 30 who were included in the pool were all placed there before October, 1980 but were discharged for cause during voir dire.

was made below and rejected *sub silentio* by the Delaware Supreme Court in its August 25, 1982 [11] opinion. The same is true for the Appellee's "waiver" claim based on Appellants' arguments to the jury. That contention was also briefed, argued, and rejected below. And, we note, the waiver argument met a particularly chilly reception at the December 18, 1981 oral argument before the Delaware Supreme Court when Justice McNeilly chided Appellee's counsel for even advancing the proposition.

The last point noted in Appellee's motion to dismiss is that this appeal was not taken in conformity with the Court rules because the Attorney General of the State of Delaware (who is not a party to this case) was not served under Supreme Court Rule 28.4(c). The Attorney General of the State of Delaware has now been served in accordance with such rule. Any such service error is not jurisdictional, *see, e.g., United States v. Adams*, 383 U.S. 39, 42 (1966); *Parker v. Levy*, 417 U.S. 733, 742, n.10 (1974), and does not serve as a ground for dismissal.

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[11] The argument was specifically rejected in the Delaware Supreme Court's now superseded March 15, 1982 opinion. 28a-37a.

CONCLUSION

For the reasons set forth in Appellants' Jurisdictional Statement and herein, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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